(22,120.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 516.

F. S. BRADLEY, TRADING AS BRADLEY & CO., PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1911.

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BRADLEY & CO.
v.
CITY OF RICHMOND.

Record, No. 264.

From the Hustings Court of the City of Richmond.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 16, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, *Clerk*.

1 In the Supreme Court of Appeals of Virginia, at Richmond.

BRADLEY & CO.
v.
CITY OF RICHMOND.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, F. S. Bradley, trading as Bradley & Co., respectfully represents that he is aggrieved by a judgment of the Hustings Court of the City of Richmond, rendered on the 19th day of October, 1908, in a cause therein depending, in which the City of Richmond was prosecuting your petitioner on the charge of conducting business as a private banker in the said city without having paid a license tax of $800.00 assessed against him as a private banker by said city for the year 1907. A transcript of the record in said cause is herewith filed, showing that, by said judgment, your petitioner was found guilty on said charge, and fined $25.00 and costs.

On the trial of said cause, your petitioner pleaded "not guilty," a jury was waived, and petitioner brought in question the validity of the assessment against him. It appears from the record that the circumstances connected with said assessment were as follows:

On pp. 58-66 of the transcript will be found the tax ordinances of the City of Richmond, under which said assessment was levied. Section 5 of the amended ordinance (p. 58) provides that all persons desiring to prosecute in the city certain designated businesses, including private banking, "and such other business as can not in the

opinion of the Committee on Finance be reached by the ad
2 valorem system, shall pay a special license tax for the privilege of prosecuting such business." Such persons are divided into thirteen classes, and required to pay from $800.00 in the first class to $10.00 in the thirteenth class. Section 18 of the original ordinance (p. 64) provides that the Committee on Finance shall classify all persons assessed with a class tax. Acting under the presumed authority of these sections, the Committee on Finance assessed private bankers with ad valorem and license taxes for the years 1905, 1906 and 1907 as shown on the statement filed as "Exhibit Hawkins No. 1" with the testimony of O. A. Hawkins, (p. 27).

Your petitioner respectfully submits to your honors that the statement just referred to presents the substance of confiscation under the guise of taxation. The lack of uniformity, and the inequality, shown by this statement are so gross as to condemn not only the action of the committee in making the assessments, but also the system which makes possible such wrongs. That the discrimination against your petitioner was not accidental is shown by the uniform lack of uniformity covering a period of three years, as well as by the direct testimony of the witnesses on behalf of the city.

The State statute, section 77 of the revenue act of 1908, defines the business of private banking, and all of the persons assessed in "Exhibit Hawkins No. 1" had exactly the same rights and privileges. Before taking up the specific assignments of error, your petitioner begs leave to point out a few of the more glaring features of the statement. Your honors will observe that under the head of "ad valorem" on the statement are shown the amounts of capital employed by the several persons in their business as private bankers, as assessed by the city for ad valorem taxation during the years mentioned.

In 1905 Thos. Branch & Co. were assessed with a license tax of $100.00 on a capital of $50,000.00; H. S. Hutzler & Co. with a license tax of $50.00 on a capital of $10,000.00; while your petitioner was assessed with a license tax of $200.00 on a capital of $1,000.00. In 1906, Hutzler & Co. were assessed the same as in 1905; Thompson & Co. with a license tax of $75.00 for nine months on a capital of $6,000.00; Tidewater Trust Co. with a license tax of $400.00 on a capital of $4,500.00; while your petitioner was assessed with a license tax of $400.00 on a capital of $1,000.00. In 1907 N. W. Bowe & Sons were assessed with a license tax of $150.00 on a
capital of $10,000.00; Chapin & Hume with a license tax of
3 $30.00 on a capital of $1,000.00; Commercial Guarantee Co with a license tax of $200.00 on a capital of $2,406.00; Hutzler & Co. with a license tax of $30.00 on a capital of $10,000.00; Pollard & Bagby with a license tax of $75.00 on a capital of $5,000.00; John L. Williams & Sons with a license tax of $200.00 on a capital of $20,000.00; while your petitioner was assessed with a license tax of $800.00 on a capital of $1,000.00. Again the statement shows that many of the persons assessed with license taxes were not assessed on the ad valorem basis at all. And furthermore, while

there was a uniform reduction in most of the license taxes for the year 1907, your petitioner's license tax was raised from $400.00 to $800.00.

The said ordinances, under which said assessment was made against petitioner, are tax measures pure and simple. There is no provision of the city charter giving the right to regulate the business of private banking, and there has been no effort on the part of the city, aside from this excessive assessment, to do so. That the purpose of the city in this levy was to make the license tax prohibitory is shown not only by "Exhibit Hawkins No. 1" but also by the testimony of O. A. Hawkins (pp. 33 & 34), and of F. W. Cunningham (pp. 42 & 43).

Petitioner makes the following assignments of error.

1. The court erred in allowing the questions and answers in the testimony of O. A. Hawkins, as shown in bills of exception Nos. 1, 2 and 3. The summons was amended at bar so as to charge petitioner specifically with conducting the business of private banking during the fiscal year 1907, without paying the said license of $800.00. The State law defined what a private banker could do. The witness was not a member of the Finance Committee by whom the assessment was made. His statements were hearsay and opinion evidence, based upon mere conjecture, and for that reason should not have been received.

2. The court erred, as shown in Bill of Exceptions No. 5 in holding that said assessment against petitioner was valid, and in imposing said fine upon him. Before taking up the several grounds of objection to said assessment, attention is directed to these general principles of law in regard to municipal taxation.

Municipal corporations can exercise only such powers as by their charters are granted in terms express, or by necessary im-
4 plication, regard being had to the purposes of the grant. Any doubt arising out of the terms employed must be resolved in favor of the public.

Kirkham v. Russell, 76 Va. 966.
Schoolfield v. Lynchburg, 78 Va. 366.

It is an established principle that the power of taxation is not possessed by a municipal corporation unless plainly conferred by the law-making power of the State. And it is equally well settled that if, when conferred, the mode in which it shall be exercised is prescribed, that mode must be strictly pursued.

Green v. Ward, 82 Va., 324.
Peters v. Lynchburg, 76 Va. 927.

Laws conferring the powers of taxation upon a municipal corporation are to be strictly construed.

City of Richmond v. Daniel, 14 Gratt. 387.
Orange, &c., R. Co. v. Alexandria, 17 Gratt. 176.
Watts v. Commonwealth, 106 Va. 851.

The Legislature may delegate to a municipality such portion of its power as it may deem wise.

Norfolk v. Griffith, 102 Va. 115, p. 119.

The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes.

Cooley Con. Lim., p. 713, citing Ould v. Richmond, 23 Gratt. 464.

"A license tax upon a trade or business can only be justified upon one or two grounds—either it is a tax upon the occupation, or else it is a police regulation. In the former case the legality of the exaction depends upon its compliance with constitutional limitations upon the power of taxation while in the latter its warrant rests upon the prevention of threatened evil."

Gordon v. Newport News, 102 Va. 649.

An act imposing an unconstitutional tax is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Campbell v. Bryant, 104 Va. 516, citing Norton v. Shelby County, 108 U. S. 425.

With these general principles in view, petitioner respectfully contends that the said assessment against him is invalid for the following reasons:

A. Section 8 of chapter 11 of the city ordinances provides that the fiscal year shall commence on the first day of February and end on the last day of January.

Section 21 of the city charter provides that no ordinance for the violation of which any penalty is imposed, shall take effect until the same shall have been published for five days consecutively in one of the daily newspapers of the said city, "to be designated by the said Council."

It appears from the testimony of B. T. August (p. 53) that this provision of the charter has never been complied with. The ordinance was published, but there was no designation by the Council as to how it should be published, and such designation was essential to the validity of the publication. The City of Richmond has no more right to set aside this provision of the charter than it has to ignore any other provision.

"* * * In general when the charter or general law requires publication, it must be made according to the requirements, else the ordinance will be void and no penalty can be enforced under it. * * * A statute requiring an ordinance to be published a specified time, with notice of the time of its consideration, is mandatory. * * *"

Smith on Munic. Cor., sec. 511, and cases cited.

"* * * When a-ternative modes of publication are contemplated by the statute, and it is expressly provided that election between these modes must be made by the corporation, an ordinance

published by order of the town clerk without election by the Council as to the mode of publication is void."

Higley v. Bunce, 10 Conn. 436 and 567.

"Where a sta-ute provides that certain powers thereby conferred upon a mayor and council shall be exercised by them in a certain manner, the unau[illegible]ed doings of an officer who undertakes to act for them canno[illegible] validated by ratification; the doctrine of estoppel does not apply to such cases."

6 Smith on Munic. Cor., sec. 286, and N. 48, citing, Mayor, &c., v. Porter, 18 Md. 289; Page v. Belvin, 88 Va. 985.

Furthermore, it appears from the evidence of Mr. August and Mr. Crenshaw that even if the ordinance had been properly published, it was not in effect at the time the finance committee made the assessment. The entire action of the committee with regard to this assessment was taken before the ordinance had been published, and there was never any action with regard to the assessment after the publication. If the Council must show subsisting authority for its acts, a fortiori must a committee of the Council show a subsisting authority for its acts. The city has not only failed to show such authority, but the record reveals the exact contrary.

B. The said ordinances and the said assessment are in conflict with the charter of the City of Richmond. The provisions of the charter are as follows:

"SEC. 69. For the execution of its powers and duties, the City Council may raise, annually, by taxes and assessments in said city such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and the United States; provided, however, that they shall impose no tax on the bonds of said city, nor on any capital invested in real estate or employed in manufacture outside the city limits, although the person or persons engaged in said business or manufacture have a place of business in said city. Neither shall they impose any tax at the same time upon the stock of the corporation, and upon the dividends thereon; nor upon any capital, interest, income, or dividends when a license or other tax is imposed upon the business in which the capital is employed, or upon the principal money, credit, or stock from which the interest, income or dividend is derived. Said taxes shall be equal and uniform upo[illegible] all property, both real and personal. The capital invested in all business operations shall be assessed and taxed as other property. Assessments upon all stock shall be according to the market value thereof."

"SEC. 70. The City Council may grant or refuse licenses and may require taxes to be paid on such licenses, to agents of insurance companies whose principal office is not located in said city;

7 to auctioneers; to public, theatrical, or other performances or shows; to keepers of billiard tables, ten-pin alleys and pistol galleries; to hawkers and pedlers in the city, or persons to sell goods by sample therein; to agents for the sale or renting of real

estate; to commission merchants, and all other business which cannot be reached by the ad valorem system under the preceding section. They may also grant or refuse such licenses to all sellers of wine or spirituous or fermented liquors, and require taxes to be paid on such licenses, in addition to other taxes imposed."

In the face of these charter provisions the City of Richmond has attempted to impose a license tax on the business of private bankers, while at the same time assessing an ad valorem tax on the capital employed by petitioner in that very business. If section 70 of the charter means anything, it limits the power of the Council in the imposition of license taxes to those businesses which cannot be reached by the ad valorem system. The record shows that the general run of mercantile business in the city is reached and taxed on the ad valorem basis. The city has recognized that the business of private banking can be reached by the ad valorem system because it not only has attempted to reach, but has reached that business upon that basis. If section 70 of the charter could be construed to invest the City Council with arbitrary authority to determine what businesses could and could not be reached by the ad valorem system, then that section of the charter itself would be in conflict with the "due process" provision of the State Constitution, and with the fourteenth amendment of the Constitution of the United States, because it would then be in the power of the Council, under the provisions of section 70, to absolutely refuse to allow these arbitrarily designated businesses to be conducted at all, no matter how beneficial they might be to the public, or necessary to the persons proposing to engage in them.

Again, these ordinances and this assessment are not justified by section 69 of the charter. The ordinance flies right in the face of the charter by providing in section 5 that the special license tax so imposed shall not exempt any such business from the usual tax on capital employed in said business. Petitioner uses this comparison between the charter and the ordinance to show how regardless the council has been of the charter provisions. Section 69 of the charter further provides that taxes shall be equal and uniform upon all property, both real and personal. The ordinance in question makes possible the grossest inequality and lack of uniformity, and
8 this possibility is converted into an actuality by the Finance Committee as shown in "Exhibit Hawkins No. 1." These principles will be enforced by the authorities to which reference will be made hereafter.

C. The ordinance and the action of the committee under it were unreasonable, and on this account also invalid.

In Danville v. Hatcher, 101 Va. 523, which was a case arising under the police power, this question is discussed, citing 1 Dillon on Municipal Corporations, section 328, where it is said, "* * * But where power to legislate on a certain subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."

Under this ordinance, the Finance Committee is given the abso-

lute and arbitrary power, within the limits of ten to eight hundred dollars, to determine what any person shall pay for the privilege of conducting any business in the City of Richmond.

"Where the law has placed in the City Council the power of legislation, in so far as its local affairs are concerned, or in other words has, by special grant, permitted a part of its sovereign power of legislation to be exercised by the local legislative body, prescribed as to territory and scope, this power so delegated can not be redelegated to some other body, committee, board, bureau, or public officer. * * * The power of assessment is referable to the power of taxation, and is itself a legislative power which must not only find express authority for its exercise, but which can be neither exercised by an executive officer, nor delegated to such officer by the legislative body of the municipality. An attempt to delegate such power to an executive officer is such covert, irresponsible, discretionary power as is wholly inconsistent with the proper exercise of the high and sovereign power of taxation or eminent domain. It might be used, and it does not affect the principle whether it was so used or not, as a cover to an unfair assessment. * * *"

Smith on Munic. Cor., sec. 531, citing Neagle v. City of Centralia, 81 Ill. App. 334; Bolton v. Gilleran, 105 Cal. 344.

"Ordinances which invest a city council or a board of trustees or officers with a discretion which is purely arbitrary, and
9 which may be exercised in the interests of a favored few, are unreasonable and invalid. * * *"

As an illustration of these principles, and without in any way attempting or intending to impugn the integrity of the Committee on Finance, petitioner desires to call your honor's attention to the fact that Mr. Pollard, of the firm of Pollard & Bagby, was a member of said committee when the said assessment was made against petitioner. The committee assessed Pollard & Bagby with a license tax of $75.00, and an ad valorem tax on a capital of $5,000.00. At the same time the committee assessed petitioner with a license tax of $800.00 for identically the same license, and an ad valorem tax on a capital of $1,000.00. (See "Exhibit Hawkins No. 1" and p. 35 of transcript.)

"* * * A by-law is void which abridges the rights and privileges conferred by the general laws of the State, unless express authority therefor can be pointed out in the corporate charter."

Cooley Cons. Lim., 7th Ed., p. 291.

The power to impose license taxes does not warrant taxes sufficiently heavy to be prohibitory.

Smith on Munic. Cor., sec. 1455, citing Craig v. Burnett, 32 Ala., 728.

See also to the same effect:

City of Carrollton v. Bazette, 159 Ill., 284.
Peoria v. Gugenheim, 61 Ill. App., 374.
City of Ottumwa v. Zekind, 95 Iowa, 622.

"So far as it (an ordinance) restricts the absolute dominion of an owner over his property, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities."

Smith on Munic. Cor., sec. 526 & cases cited.

D. The said ordinance and assessment are invalid, because in conflict with sec. 170 of the Constitution of Virginia providing for the imposition of license taxes on any business which cannot be reached by the ad valorem system. The decisions recognize this constitutional provision as a limitation on the power of the Legislature with regard to license taxes.

N. & W. R. R. Co. v. Suffolk, 103 Va., p. 502.
Gordon v. Newport News, 102 Va., 649.

10 It would be difficult to conceive of a plainer departure from the constitutional requirement than that presented by said assessment against your petitioner, for the City of Richmond has in effect ordained that the business of private banking can be reached by the ad valorem system.

E. The said ordinance and assessment are invalid, because in conflict with sec. 168 of the Constitution of Virginia which provides that all taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

Petitioner has shown by reference to "Exhibit Hawkins No. 1" how unequal and ununiform were the assessments made by the city against private bankers for the year 1907, and has also shown by reference to the assessments for the two previous years, that the discrimination was not accidental but studied.

"If inequality and want of uniformity in the burden it imposes are stamped upon the face of the law, the law must be pronounced invalid."

Helfrick's Case, 29 Gratt., 49.

In Cooley's Constitutional Limitations, pp. 703 & 704, it is said: "The burden must be borne by those upon whom it justly rests, and to recognize in the State a power to compel some single districts to assume and discharge a State debt would be to recognize its power to make an obnoxious district or an obnoxious class bear the whole burden of State government. An act to that effect would not be taxation, nor would it be the exercise of any legitimate legislative authority. And it may be said of such an act, that, so far as it would operate to make those who would pay the tolls pay more than their proportion of the State obligation, it was in effect taking their property for the private benefit of other citizens of the State, and was obnoxious to all the objections against the appropriation of private property for private purposes which could exist in any other case."

"A tax, whether direct, upon property in proportion to its value, or upon some basis of apportionment which the legislature shall regard as just, must keep in view the general idea of uniformity."

Fulkerson v. Bristol, 105 Va., 555, p. 561.

11 "A municipal ordinance imposing licenses or business taxes must not discriminate against any business or class of business, or against non-residents, or persons engaged in the sale of property, produced or manufactured outside of the municipality."
21 A. & E. Enc. Law 784.
State v. Jackman, 69 N. H. 318.

In Norfolk, etc., Co. v. Norfolk, 105 Va. 139, the court, in arguing to sustain the facts in that case, says, "* * * Neither does it appear that all persons in the same class or doing precisely the same business are not taxed alike."

In Campbell v. Bryant, 104 Va., p. 515, it is said that the uniformity required extends not only to the rate and mode of assessment but also to the territory to be assessed, and when the tax is levied by a county, it must be uniform throughout the county.

In Newport News, &c., R. Co. v. Newport News, 100 Va. 157, p. 161, the court uses this language, "The license tax required is not unequal taxation, because the ordinance imposing it applies alike to all street railway companies. Uniformity must be such as is compatible with the subject-matter, and, as to licenses, the only uniformity required is that the tax shall be the same on all those in the same business."

"The power to determine what persons or property shall be taxed is left exclusively to the legislative department of the State or municipality; but the tax must be levied on the subjects thus chosen, so as to meet the constitutional requirements of equality and uniformity. The State Legislature is limited in its selection of subjects only by the Constitution, but municipalities are not allowed such a wide discretion. Municipal charters may contain express limitations, or certain limitations may be implied. * * *"
Smith on Munic. Cor., sec. 1451.

F. The said ordinance and the said assessment are in violation of the Constitution of Virginia guaranteeing due process of law, and also in violation of the Fourteenth Amendment of the Constitution of the United States, guaranteeing due process of law and the equal protection of the laws, and the other protections mentioned therein.

12 In Cooley's Constitutional Limitations, page 695, it is said:
"Having thus indicated the extent of taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government. In the first place taxation having for its legitimate object the raising of money for public purposes, and the proper needs of government, the exaction of moneys from

the citizens for other purposes is not a proper exercise of this power, and must, therefore, be unauthorized. * * *"

Judge Cooley discusses this phase of the subject in chapter 11 of his work referred to, and petitioner will give a few quotations from the same:

Pages 503 and 504: "When the law of the land is spoken of, 'undoubtedly a pre-existing rule of conduct' is intended, 'not an ex post facto rescript or decree made for the occasion. The design "is" to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute.'"

"While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interferences, even though such interference may be under a rule impartial in its operation."

And on page 505, this definition of due process of law is quoted from the opinion by Mr. Justice Johnson in the case of Bank of Columbia v. Okeley, 4 Wheat., 235, 244:

13 "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Page 507: "In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determened by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end."

Page 556: "But a statute would not be constitutional which should proscribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt."

Page 562: "Equality of rights, privileges and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions are granted, or special burdens or restrictions imposed in any case it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government."

In Connolly v. Union Sewer Pipe Co., 184 U. S., 540, the court said:

"The difficulty is not met by saying that generally speaking

the State, when enacting laws, may, in its discretion, make a classification of firms, corporations and associations in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is pro-
14 posed and can never be made arbitrarily and without any such basis, * * *. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this * * *. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the security of free government * * *. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

To the same effect are

Standard Oil Co. v. Fredericksburg, 105 Va. 82.
Morton v. Mayor, &c., 111 Ga. 162.
Rodge v. Kelly, 88 Miss. 209.

The last two mentioned cases are directly in point in condemning the said assessment against your petitioner.

Wherefore, petitioner prays that a writ of error from and supersedeas to the said judgment may be allowed him, and that the same may be reviewed and reversed.

Respectfully submitted,

F. S. BRADLEY,
Trading as Bradley & Co.,
By SMITH, MONCURE & GORDON,
His Attorneys.

We, William A. Moncure and James W. Gordon, attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that, in our opinion, there is error in the judgment of the Hustings Court of the City of Richmond complained of in the foregoing petition of F. S Bradley, trading as Bradley & Co., for which the same should be reviewed and reversed.

WILLIAM A. MONCURE.
JAMES W. GORDON.

Dec. 3rd, 1908.

Writ of error and supersedeas awarded. Bond, $200.

15 STATE OF VIRGINIA,
City of Richmond, To wit:

Pleas at the Courthouse of the City of Richmond, Before the Hustings Court of the Said City, on the 3rd Day of November, 1908.

Be it remembered, that heretofore, to-wit, on the 19th day of October, 1907, Bradley & Co. filed in the clerk's office of said court their appeal from the judgment of the police justice of said city, convicting them of a violation of an ordinance of said city, as set forth in the summons issued against the said Bradley & Co., which summons and judgment are in the words and figures following, to-wit:

CITY OF RICHMOND, *To wit:*

To any Police Officer of Said City:

Summon Bradley & Co. to appear before me or some other justice of the peace of said city, at the Police Justice's Court, in the City Hall, on the 8th day of August, 1907, at the hour 9½ o'clock A. M. to show cause, if any they can, why a fine of one hundred dollars should not be imposed on them for violation of ordinance of said city by failing to pay the city class tax assessed against them. And be you then there to certify what you have done in the execution thereof.

Given under my hand and seal in said city, this 8th day of August, 1907.

JOHN J. CRUTCHFIELD, [SEAL.
Police Justice.

In Police Justice's Court, City of Richmond.

AUGUST 8TH, 1907.

I, John J. Crutchfield, police justice of the said city, do certify that upon a hearing of the charge as within set forth against the said Bradley & Co., I adjudged him, the said Bradley & Co. guilty of the violation of said ordinance, and imposed upon him a fine of twenty-five dollars and cost, and gave judgment accordingly,
16 and the said Bradley & Co. having prayed an appeal from my said judgment, and having tendered as his surety, J. W. Gordon, who thereupon undertook as such surety, for the payment of said fine and all costs and damages in case the same shall be affirmed, an appeal from my said judgment is granted the said Bradley & Co. to the next term of the Hustings Court.

Given under my hand this 8th day of August, 1907.

JOHN J. CRUTCHFIELD,
Police Justice.

And at another day, to-wit: At a Hustings Court held for the said city at the courthouse on the 24th day of March, 1908, came

the City of Richmond, by George Wayne Anderson, assistant City Attorney, as well as the defendant, F. S. Bradley, trading as Bradley & Co., by Smith, Moncure and Gordon, his attorneys, and neither party requiring a jury, the whole matter of law and of fact is submitted to the judgment and decision of the court. And thereupon the said defendant demurred to the summons issued by the police justice of this city, and also moved the court to quash the said summons for errors and irregularities apparent upon its face, which demurrer and motion to quash, the court doth sustain, and doth allow the said assistant city attorney to amend at bar the said summons. The defendant thereupon pleaded not guilty to the charge as set forth in the amended summons, and the court having partly heard the evidence, doth continue the further hearing of this case until tomorrow morning at ten o'clock.

And at another day, to-wit: At the same Hustings Court, continued by adjournment, and held for the said city at the courthouse on the 25th day of March, 1908, again came the parties, by their attorneys, and the court having fully heard the evidence and not being at present advised of its judgment, takes time to consider thereof.

And at another day, to-wit: At a like Hustings Court, continued by adjournment, and held for the said city at the courthouse, on the 19th day of October, 1908, again came the City of Richmond, by H. R. Pollard, City Attorney, as well as the defendants, by Smith, Moncure and Gordon, their attorneys, and the court having maturely considered the evidence and arguments of counsel, it is considered by the court that the judgment of the police justice of this
17 city be affirmed, and that the City of Richmond recover against the said Bradley & Co. a fine of twenty-five dollars and the costs of this prosecution. To which action of the court in rendering judgment against the said defendants, the said defendants, by their attorneys, excepted, and they are allowed thirty days from this day to prepare and file their bill of exception.

The execution of this judgment is suspended, however, at the request of the defendants, by their attorneys, for a period of sixty days from this date in order to allow them time to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment aforesaid.

And now, at this day, to-wit: At a like Hustings Court, continued by adjournment, and held for the said city, at the courthouse on the 3rd day of November, 1908 (being the same day and year first hereinbefore written), the defendants, by Smith, Moncure and Gordon, their attorneys, in accordance with the leave of the court heretofore granted them, this day tendered to the court their several bills of exceptions, which are received, signed and sealed by the court, and made parts of the record hereof, which bills of exceptions are in the words and figures following, to-wit:

CITY OF RICHMOND
v.
BRADLEY & COMPANY.

Defendant's Bill of Exception No. 1.

Be it remembered, that on the trial of this cause, after the prosecutor had introduced the charter and tax ordinance of the City of Richmond, and also evidence of the assessments of private bankers' license taxes against the defendant, and other persons, for the year 1907, as set out in Defendant's Bill of Exception No. 5 and while O. A. Hawkins, commissioner of the revenue of the City of Richmond, who was not a member of the Finance Committee of the City Council, nor a member of the Council, was being examined on behalf of the prosecutor, counsel for the prosecutor asked the witness, "Why were those private bankers put in the first class?" To which question, and any answer thereto, the defendant, by counsel, objected. But the court overruled the said objection, and thereupon the witness
18 replied as follows: "Well, sir, because they were thought to be doing the business of loaning money on furniture and salaries and that class of business at an excessive rate that has produced a great many cases in court, in contradistinction from the gentlemen who were handling notes in the regular course as the result of real estate loans and things of that kind." To which answer, the defendant, by counsel, again objected, but the court overruled the said objection and allowed the said answer to stand.

To which action of the court in overruling said objections, and allowing the said question and answer, the defendant, by counsel, excepted, and tendered his Bill of Exception No. 1, and prayed that the same might be signed, sealed and made a part of the record, which was accordingly done.

S. B. WITT. [SEAL.]

CITY OF RICHMOND
v.
BRADLEY & COMPANY.

Defendant's Bill of Exceptions No. 2.

Be it remembered, that on the trial of this case, after the prosecutor had introduced the charter and tax ordinance of the City of Richmond, and also evidence of the assessments of private bankers' license taxes against the defendant, and other persons, for the year 1907, as set out in Defendant's Bill of Exceptions No. 5 and while O. A. Hawkins, commissioner of the revenue of the City of Richmond, who was not a member of the Finance Committee of the City Council, nor a member of the Council, was being examined on behalf of the prosecutor, counsel for the prosecutor asked the witness, "Mr. Hawkins, you have testified that under the ordinance you were required to be present at the meeting of the Finance Committee when these

licenses were assessed, and give them aid and information, and you have testified that some seven or eight of these private bankers were put in the first class. Did the Finance Committee ask any information or aid of you as to what class they should assign these private bankers who were put in the first class to?" To which question, and any answer thereto, the defendant, by counsel, objected. But the court overruled the said objection, and thereupon the witness
19 replied as follows: "Yes, sir, they virtually asked me if each one of these men who were put in the first class belonged to the class that were supposed to be loaning money on salaries, furniture, etc., and I told them that those parties that were put in this class were supposed to belong to that class." To which answer, the defendant, by counsel, again objected, but the court overruled the said objection, and allowed the said answer to stand.

To which action of the court in overruling the said objections, and allowing the said question and answer the defendant, by counsel, excepted, and tendered his Bill of Exceptions No. 2, and prayed that the same might be signed, sealed, and made a part of the record, which was accordingly done.

CITY OF RICHMOND
v.
BRADLEY & COMPANY.

Defendant's Bill of Exceptions No. 3.

Be it remembered, that on the trial of this case, after the prosecutor had introduced the charter and tax ordinance of the City of Richmond, and also evidence of the assessments of private bankers' license taxes against the defendant, and other persons, for the year 1907, as set out in Defendant's Bill of Exceptions No. 5, and while O. A. Hawkins, commissioner of the revenue of the City of Richmond, who was not a member of the Finance Committee of the City Council, nor a member of the Council, was being examined on behalf of the prosecutor, counsel for the prosecutor asked the witness: "You were asked by my friends on the other side whether the object of placing this license at $800.00, or the placing of these parties in the $800.00 class was to prohibit their doing this business. You said that you thought, personally, that it was. Why do you think that there was a desire to prohibit their doing business?" To which question and any answer thereto, the defendant, by counsel, objected, but the court overruled the objection, and thereupon, the witness replied as follows: "I know in connection with some of the parties there had been a great deal of notoriety through the newspapers. There had been a good many cases reported in the newspapers. The only way I would know about the cases in court would be through newspaper reports—as evidenced by trials in court—
20 on account of the notoriety the business had obtained of trial in court, people who claimed that they had been imposed on by excessive charges of interest, etc." To which answer, the defend-

ant, by counsel, again objected, but the court overruled the objection, and allowed the answer to stand.

To which action of the court in overruling the said objections, and allowing said question and answer the defendant, by counsel, excepted, and tendered his Bill of Exceptions No. 3 and prayed that the same might be signed, sealed, and made a part of the record, which was accordingly done.

S. B. WITT. [SEAL.]

CITY OF RICHMOND
v.
BRADLEY & COMPANY.

Defendant's Bill of Exception No. 5.

Be it remembered, that on the trial of this case, after all the evidence had been introduced (all questions of law and fact having been submitted to the court for its decision and judgment), the court decided that the assessment of license tax of $800.00 by the prosecutor against the defendant for the privilege of conducting business as a private banker for the year 1907 was a valid assessment, and found the defendant guilty and entered judgment against defendant for a fine of $25.00; to which decision and judgment of the court, the defendant, by counsel, excepted, and tendered his Bill of Exceptions No. 5, which he prayed might be signed, sealed and made a part of the record, which was accordingly done.

And the court certifies that the following is the evidence, and all the evidence introduced on the trial of said cause.

In the Hustings Court of Richmond.

CITY OF RICHMOND
v.
F. S. BRADLEY, Trading as Bradley & Co.

21 On an Appeal from Police Court.

Plaintiff's attorney, Col. Geo. Wayne Anderson, asst. city atty.; defendant's attorneys, Messrs. Smith, Moncure & Gordon.

Stenographic Report of the Evidence.

Mr. GORDON: It is understood and agreed between counsel for the City of Richmond and the seven parties or firms, represented by us here to-day, that we will take up the case of the City of Richmond against Bradley & Co. and make that a test case which will control the decision in all the other cases.

We think that this warrant, or this summons, is not sufficient on its face.

The COURT: I have already called Colonel Anderson's attention to the fact that it is imperfect. It occurred to me it did not give to the parties sufficient notice. You had better read the paper.

NOTE.—Mr. Gordon here read the original summons.

Mr. GORDON: The defendant demurs to the summons and moves to quash the same.

The COURT: Col. Anderson, it occurs to me that, in a criminal prosecution you should set out who are the members of the firm of Bradley & Co. and, doing business as the firm of Bradley & Co., have failed to pay the tax levied under this section, in that they failed to pay the tax levied by the commissioner of the revenue.

Col. ANDERSON: The ordinance itself designates this as a class tax, and I am inclined to think that the summons is sufficient, but, if your honor is disposed to sustain the demurrer, I ask leave to amend.

The COURT: Yes, sir, I think you had better make it explicit. Let us know whom we are prosecuting, and put down the name and initials of Bradley. Have you any other suggestion or statement to make, Mr. Gordon?

Mr. GORDON: I think in a criminal prosecution, the city ought to designate the business which has been conducted without a license.

The COURT: That is what I am trying to get at now. That
22 was the object of my suggestion to Colonel Anderson—not only the license, but the people who are carrying it on. If we indicted Smith, Moncure and Gordon, we would have to indict H. M. Smith, Jr., W. A. Moncure and Jas. W. Gordon, doing business as the firm of Smith, Moncure & Gordon.

Mr. GORDON: You issue a license to a merchant to carry on the dry goods business or bar room business, or to a man to practice law or medicine, but you don't issue to him a license, known as a class license.

The COURT: You can call it class license if you choose, but you must explain what you mean by class license.

Col. ANDERSON: I ask leave to amend the warrant and make it read as follows:

NOTE.—The summons as amended was here read.

The COURT: Have you any objection to that, Mr. Smith?

Mr. SMITH: I have no objection, but I think it would be better if you add there "He, the said F. S. Bradley, not having paid such tax."

Col. ANDERSON: I accept that suggestion with pleasure. I ask leave to introduce in evidence the printed copy of the ordinance of the city, which became a law on February 13th, 1906, which you have before you, published by authority of the city.

I ask leave also to introduce in evidence amendment to the said ordinance, certified to by the clerk of the city, approved December 18th, 1906, under which this particular tax was assessed.

The COURT: This tax was assessed under this?

Col. ANDERSON: Yes, sir, under that. In the fifth section you will find the point of difference, affecting this case, where private bankers

are especially named, whereas in the ordinance before, they had not been especially named.

I ask leave to introduce in evidence sections 69 and 70, page 138, of the Acts of Assembly of 1869-70—the tax section and the license section of the city charter.

Agreement.

It is agreed by counsel representing both parties that all the provisions of the charter of the City of Richmond and all of the
23 ordinances of the City of Richmond, either original or amended, bearing on this question may be considered as part of this record the same as if introduced and read.

O. A. HAWKINS, a witness on behalf of the City of Richmond, being first duly sworn, testified as follows:

Examination in Chief.

By Col. ANDERSON:

Q. Mr. Hawkins, please state to the court what your official position, if any, is in the City of Richmond?

A. Commissioner of the revenue.

Q. Do you or not have any duties to perform in connection with the finance committee of the city in the matter of the assessment of license taxes?

A. Yes, sir.

Q. Please state to the court what they are?

A. It is the duty of the commissioner, under the ordinances, to ascertain the names of all individuals and firms or corporations doing business in the city liable to tax under the ordinances, and list them on the book and lay them before the finance committee; and the ordinance makes it the duty of the commissioner to be present with the finance committee and give them any assistance he can, that they may ask for, in the fixing of the licenses annually.

Q. Have you any clerical duties in relation to that work of the finance committee?

A. The recording of the figures and names in the license imposed on each of the individuals, firms or corporations.

Q. At what time of year does the committee, under the ordinance, call upon you for this assistance in the matter of license assessments?

A. As soon after the first of February as we can assemble the names on the books.

Q. Did you perform the duties named by you in the matter of the assessments of licenses in 1907?

A. Yes, sir.

Q. Were you present with the finance committee?

A. Yes, sir.

Q. When they assessed the licenses?

A. Yes, sir.

24 Q. Under the ordinances, how many classes do they subdivide these licenses into?

A. Other than these specifically named, there is one section there after naming several lines, then adds "in other businesses," and they are divided into nine classes, ranging from $10 to $800.

Col. ANDERSON: Thirteen as a matter of fact.

WITNESS: Thirteen then. It used to be nine—ranging from $10 to $800.

Q. Did the finance committee, at the meeting in 1907, subdivide these business licenses into these thirteen classes as required by the ordinances?

A. I could not say that they used the whole thirteen, but they divided them and made several different classes.

Q. As I understand you, it was their duty to assign individuals to the proper classes for the purpose of license taxation?

A. Yes, sir.

Q. Did they assign F. S. Bradley, doing business as Bradley & Co., to any class?

A. Yes, sir.

Q. To what class did they assign him?

A. I haven't looked at that book for 1907. I could tell you in a minute, unless it is admitted.

Mr. GORDON: They put him in the first class, $800.

WITNESS: Eight hundred dollars. That was my thought, but I couldn't say positively.

By Col. ANDERSON:

Q. Mr. Hawkins, after the finance committee had placed the various individuals in the several classes to which they belonged, what duties did you then have in relation to that classification?

A. To make a copy of it, first, and put it on the auditor's desk, where it remained for a period of time, during which the auditor advertised daily that such a list was there with the amount of licenses fixed, open for the public. At the end of the time specified, by order of the finance committee, the book was brought back before the finance committee and they held a meeting. In this notice the statement was made that anybody who felt aggrieved at the license
25 imposed on them would have a chance to be heard by the committee. That was done and a good number of people came and entered protest against the amount assessed.

Q. Were you present at that meeting?

A. Yes, sir,

Q. Did Bradley appear?

A. I think Mr. Gordon, representing him, appeared.

Q. He appeared through his counsel, Mr. Gordon?

A. Yes, sir, I might state that up to last year the lawyers were graduated in the license from $10.00 upwards.

Q. From ten up to what?

A. I think about $100 was the highest put on attorneys.

Q. After the finance committee had heard these requests for re-

ductions, did you then have any other duties in relation to this matter?

A. Any corrections that they ordered were made on the book that is kept in the office of the commissioner—the book that goes to the auditor—and then a copy of the corrected book is made up and handed to the city collector, by which he collects the licenses.

Q. Was a copy handed to the city collector?

A. Yes, sir.

Q. Did the committee reduce the license upon Bradley's application through counsel?

A. No, sir.

Q. Do you know of your own knowledge whether he took an appeal to the Council?

A. I do not, sir. The ordinance provides that an appeal will lie to the Council at the first meeting after the license was finally fixed The ordinance provides for application to the Council for a reduction after the finance committee declines. Whether Mr. Bradley made an appeal to the Council or not, I don't know.

Q. Mr. Hawkins, what is the character of the business done by Bradley & Co.?

A. Personally, don't know, sir.

Mr. GORDON: I object to any statement if he doesn't know.

WITNESS: I say I don't know personally the character of business done by Mr. Bradley.

By Mr. SMITH:

Q. Except that they are private bankers?

A. Except that they are under the head of private bankers.

26 We follow under the city side as in the State side; the State provision is, if the character of business in which a party engages is not sufficiently set out, we are directed by the auditor to put him in the class to which he would come nearest. I will say this, that I suppose, that, as far as my own knowledge goes, about the character of business done as private bankers by real estate men, the finance committee, as I understand it, realizes that they are imposing a license in that case on these gentlemen for the privilege of negotiating loans on real estate.

By Mr. GORDON:

Q. That is your understanding. You know they also lend money without real estate loans, every one of them? Isn't that true?

A. I don't think they lend it on furniture or salaries, or things of that kind. I don't think the real estate men do that.

Mr. SMITH: They take anything they can get, is my experience

By Col. ANDERSON:

Q. How many of these private bankers are put in the first class?

A. I wouldn't say positively. I think six or seven.

Col. ANDERSON: I would like for you to be accurate about it.

Mr. GORDON: I have got the whole thing right here, if you wish to verify it (exhibiting paper).

The COURT: Just put down on the record who were put in the first class, and what were the assessments.

Mr. GORDON: I will introduce this whole paper after he has verified it.

The COURT: In answer to Col. Anderson's question as to who were put in the first class, I would like to have him put down who were in the first class, and the different assessments.

Mr. SMITH: Suppose Col. Anderson will agree that this thing be made a part of the record.

The COURT: I would like to have this evidence now.

WITNESS: I can read the names from the list if you care.

27 The COURT: I would like to have these specific names put right down now.

WITNESS: They- are eight of them.

Mr. SMITH: Let us agree that this may be made part of the record now. We will be able to prove it.

Col. ANDERSON: I am going to object to that paper.

WITNESS (reading): "Bradley & Co.——

The COURT: Put down what his capital is and what he is assessed at.

Col. ANDERSON: I object to his capital being put down.

The COURT: That is a public record.

Col. ANDERSON: I submit, the capital is not evidence.

The COURT: It is evidence as throwing light on the reasonableness of the ordinance taxing him $800. It is evidence to that extent and no further.

WITNESS: The finance committee don't know anything about capital when they are assessing taxes.

The COURT: You are levying a specific license tax, and, in order for that tax to be constitutional, it must be reasonable.

WITNESS: "Bradley & Co., $800."——

Col. ANDERSON: I want to object to and except to the introduction of evidence as to the capital in business, as not being pertinent evidence——

The COURT: This is your witness now. You can go on with him to suit yourself, and discuss the question as to whether that is admissible later on.

By Col. ANDERSON:

Q. I asked you, Mr. Hawkins, if you knew how many of these private bankers were put in the first class, and who they were—in the first class of license taxes?

A. Bradley & Co., T. Gullette, Industrial Bond & Banking Company, Legon & Co., D. E. Pollard, Pervis & Co., W. E. Mathews, Richmond Loan Company, D. H. Tolman, Tidewater Trust Company, Thompson & Co., and Virginia Loan Company.

Q. Why were those private bankers put in the first class?

Mr. SMITH: We object. He is not a member of the finance committee.

Col. ANDERSON: The ordinance shows that he is required
28 to be present in aiding and assisting the finance committee in assigning these people to a classification. The fact is, he is the man under the ordinance to whom they appeal for instruction and information on these points. He is certainly a man qualified on that point.

Mr. GORDON: The State law defines a private banker and what a private banker can do, and it is conceded that they come here now with a warrant charging him with having transacted business as a private banker without a license.

The COURT: In your opening statement you complained that these people had been put in the $800 class when other people had been put in a lower class. I think that, under that idea, Mr. Hawkin's testimony is admissible.

Mr. SMITH: Our only contention is just this: That the charter provides that the City Council themselves shall make this classification and assessment, and we even go so far as to say that they can't delegate that power to a committee. You are going still further off. We are getting down to a man who is not even a member of the Council, and is not even a member of the finance committee, and undertaking to give the reason why the finance committee did these things.

The COURT: That is admissible evidence on the point of the reasonableness of this ordinance. I so rule.

Mr. SMITH: We except. If he knows of any reasons or facts which would justify this classification, if he himself personally knows; but he can't give the finance committee's reason.

The COURT: Mr. Hawkins was there. He can give the reason why this assessment was made. That is my ruling.

Mr. SMITH: If he knows of any himself.

The COURT: Yes, sir.

Mr. SMITH: We except to the question and answer as hearsay and as undertaking to give the reason for somebody else's conduct, and also that, if there is any record showing why they made this classification the record should be produced.

By Col. ANDERSON:

Q. Why were they put in the first class, Mr. Hawkins?

A. Well, sir, because they were thought to be doing the business of lending money on furniture and salaries and that class of business at an excessive rate that has produced a great many cases in court, in contradistinction from the gentlemen who
29 were handling notes in the regular course as the result of real estate loans and things of that kind.

Q. In other words, they were doing a different sort of business from the regular banking business?

A. That is what was thought of it by the committee. The Legislature a few years ago passed a law covering that case.

Mr. SMITH: We except to the question and answer.

By Col. ANDERSON:

Q. Mr. Hawkins, do you know the general reputation of Bradley & Co., in this community?

Mr. GORDON: I object.
The COURT: Objection sustained.
Col. ANDERSON: I except.

By Col. ANDERSON:

Q. Do you know, Mr. Hawkins, by general reputation the character of the business that is done by Bradley & Co. in this community?

Mr. SMITH: We object.
The COURT: He has already stated that, that it is lending money on salaries and furniture and things of that sort.
Col. ANDERSON: He stated it in reply to a question to which exception was taken.
The COURT: It is already in. It is no use cumbering the record with that.
Col. ANDERSON: I would like for him to answer the question.
The COURT: Go ahead and answer the question.
Mr. SMITH: We except again.

By Col. ANDERSON:

Q. I ask you if you know the general reputation in this community of the character of business that is done by Bradley & Co.?

Mr. SMITH: We object, and for two reasons. I don't know of any authority that allows you to prove general reputation——
The COURT: I sustain that objection. He can't prove by
30 general reputation the character of a man's business. That is a specific fact that has to be proved.
Col. ANDERSON: Does your honor rule I will have to introduce some person who has borrowed from Bradley & Co.?
The COURT: I will rule on that when it comes up.
Col. ANDERSON: I except to the ruling of the court in excluding that question.

By Col. ANDERSON:

Q. Mr. Hawkins, you have testified that under the ordinance you were required to be present at the meeting of the finance committee when these licenses were assessed and give them aid and information and you have testified that some seven or eight of these private bankers were put in the first class. Did the finance committee ask any information or aid of you as to what class they should assign these private bankers, who were put in the first class, to?

Mr. SMITH: We object to that question.
The COURT: You can get the finance committee. Better have the testimony of some of the members of the finance committee; then Mr. Hawkins' evidence might be supplemental.
Col. ANDERSON. I expect to put members of the finance committee

on. I thought I was laying the foundation by asking him the question, too.

The COURT: Let him answer the question.

A. Yes, sir, they virtually asked me if each one of these men, who were put in the class, belonged to the class that were supposed to be lending money on salaries, furniture, etc., and I told them that those parties that were put in this class were supposed to belong to that class.

Mr. SMITH: I object to the question and answer.

The COURT: Let it go in.

Mr. SMITH: I note an exception.

By Col. ANDERSON:

Q. How long has Bradley & Co. been doing business in Richmond, do you know?

A. As Bradley & Co., I think, two years. I think before that they did business as Green & Co.

31 Q. Was Mr. F. S. Bradley a member of the firm of Green & Co.?

A. I will have to look at my books. I am not sure whether Mr. F. S. Bradley or some other Bradley's name was given as a member of that concern. I think I had the name of Bradley as proprietor, but I would not like to say at the moment that it was F. S.

Mr. SMITH: Why would that have anything to do with it? Green & Co. have nothing to do with this case?

The COURT: He asked the question, how long Bradley had been in this business in Richmond.

Mr. SMITH: I have no objection to giving that information.

Col. ANDERSON: I am trying to show the court why it was that these seven or eight men were put in that class.

The COURT: And I say it is proper for you to ask him that question.

Mr. GORDON: Mr. Bradley says he has been in business as Bradley & Co. for two years, and prior to that time the business of Green & Co. was a different business; he was interested in it, but it was a different business.

WITNESS: I think Mr. Bradley ran his business in some other name than F. S. Bradley before.

By Mr. SMITH:

Q. You think he was in business prior to that time under some other name?

A. Yes, sir, like Ligon & Co.; then I think it was Thompson, and then Thompson & Co., taking over Ligon's business. I don't think there was ever anybody named Ligon here.

By Col. ANDERSON:

Q. Do you know what business Green & Co. did?

A. Supposedly the same class of business that Bradley & Co. did and other parties who were named.

Q. Do you know whether F. S. Bradley was connected at any other time with any other concern that did this character of business?

A. Other than Green & Co., which has been just admitted by his counsel, no, sir, I do not.

Cross-examination.

By Mr. GORDON:

32 Q. I show you here a sheet, marked "Exhibit Hawkins No. 1," containing the names of various persons, and also in separate columns certain figures, under the dates of 1905, 1906 and 1907, with headings of License and Ad Valorems. Please state whether or not this sheet represents the private bankers' licenses and all of the private bankers' licenses assessed by the finance committee of the City Council of the City of Richmond, and also the assessments as far as they went on the ad valorem basis upon the capital employed in these several businesses for those years?

BRADLEY & Co. *v.* CITY OF RICHMOND.

EXHIBIT HAWKINS No. 1.

Private Bankers' Licenses and Capital of Private Bankers Assessed with ad Valorem Tax by City of Richmond.

Name.	1905. License.	1905. Ad valorem.	1906. License.	1906. Ad valorem.	1907. License.	1907. Ad valorem.
Adams & Company	$200.00					
J. T. Brown & Co	150.00	$400.00	$150.00		$100.00	
Thos. Branch & Co	100.00	50,000.00				
N. W. Bowe & Sons	150.00		150.00		150.00	$10,000.00
Brown Furniture Co	200.00	600.00				
W. C. Blanton					20.00	
Brady & Co	200.00					
J. H. Braxton	35.00		30.00		20.00	
Jas. H. Crenshaw	35.00		30.00		20.00	
J. D. Carneal & Son	100.00		150.00		100.00	
Chapin & Hume	50.00		50.00		30.00	1,000.00
E. A. Catlin	100.00		75.00		50.00	
H. L. Cabell & Co	35.00					
J. A. Connelly & Co	35.00		75.00		50.00	
A. J. Chewning & Co	50.00		50.00		30.00	
Central Banking Co	200.00	1,700.00	400.00	$1,700.00		
Capital City Loan & Trust Co	200.00					
Commercial Guarantee Co	200.00	2,335.00	200.00	2,500.00	200.00	2,406.00
R. B. Chaffin & Co	75.00	1,000.00	75.00		50 00	
Central Advance Co	200.00		400.00	800.00		
C. L. & H. L. Denoon	100.00		100.00		75.00	
R. W. Doyle	200.00	1,000.00	400.00			
J. B. Elam & Co	150.00		150.00		100 00	
Green & Co. and Bradley & Co.	200.00	1,000.00	400.00	1,000.00	800.00	1,000.00
Green & Redd	50.00		75.00		50.00	
J. T. Goddin & Co	75.00		500.00		30.00	
Gordon & Whitlock			50.00			
C. T. Gullette			50.00	1,000.00	800.00	
H. S. Hutzler & Co	50.00	10,000.00	50.00	10,000.00	30.00	10,000 00

Harrison & Grant	35.00		30.00		20.00	
Howard & Co	200.00					
Harwood & Co					30.00	
Home Trading Co	200.00	800.00				
B. T. Hamilton & Co					20.00	
Industrial Bond & Banking Co	200.00	2,500.00	100 00	2,500.00	800.00	2,500.00
Young Jones	200.00	1,500.00				
Lowney & Co	400.00					
H. A. McCurdy	75.00		75.00		50.00	
McVeigh & Glinn	75.00		75.00	400.00	50.00	
Legon & Co	200.00	1,000.00	400.00	1,000.00	800.00	1,000.00
A. E. Long (9 mos.)					22.50	
Pollard & Bagby	75.00		100.00		75.00	5,000.00
W. B. Pizzini & Co	75.00		100.00		75.00	
D. E. Pollard					800 00	
Purvis & Co					800.00	1,000.00
W. E. Matthews					800.00	
W. E. Rose & Co	50.00		50.00		30.00	1,000.00
Chas. A. Rose	75.00		50.00		20.00	
Richmond Loan & Guarantee Co	400.00				800.00	
Real Estate Trust Co	50.00		30.00			
Realty Bond & Trust Co	75.00					
Richmond Loan Co			400.00	5,000.00		5,000.00
Sutton & Co	150.00		150.00		100.00	
Schomburg & Sullivan					30.00	
Douglas E. Taylor	50.00		50.00		30.00	
H. Selden Taylor & Co	150.00		150.00		100.00	
D. H. Talman	400.00	500.00	400.00	1,025.00	800.00	1,000.00
Tidewater Trust Co	400.00	9,000.00	400.00	4,500.00	800 00	4,500.00
Thompson & Co	400.00		75.00 (9 mo.)	6,000.00		2,000.00
Virginia Loan Co			41.67 (5 mo.)		800.00	1,400.00
T. M. Wortham & Co	50.00		50.00		30.00	
Chas. K. Willis			41.65 (10 mo.)		50.00	
John L. Williams & Sons					200.00	20,000.00
Wade & Co	400.00					

35 WITNESS: That being a copy of the paper furnished to Col. Anderson——

Mr. SMITH: Yes, sir.

Col. ANDERSON: I object to this paper as far as it exhibits the ad valorem tax.

The COURT: I rule that that is admissible evidence as bearing on the reasonableness of this tax against these men.

Col. ANDERSON: I except.

WITNESS: That being a copy of the paper submitted to Col. Anderson——

Mr. SMITH: It is so admitted, is it not, Colonel?

Mr. GORDON: I made it as an exact copy.

Col. ANDERSON: That is a copy.

A. That being admitted as a copy of the paper furnished me by Col. Anderson, I had that paper checked up by one of the deputies in my office; and he reported to me it was in accord with the records in the book.

Mr. SMITH: It is agreed by counsel on each side that this is an exact copy of the paper given you by Col. Anderson, assistant attorney for the City of Richmond.

By Mr. GORDON:

Q. As I understand it, Mr. Hawkins, wherever blanks appear opposite the names of these persons on this sheet, under the different columns indicating the different years, that is an indication that as to that particular item of license or ad valorem tax there was no assessment made?

A. I couldn't say that clearly, because the supplement we carry on the city side is a very large one, and frequently when capital is not assessed on the name book it is assessed on the supplement.

Mr. GORDON: I will ask you to take this sheet and make any corrections in it from the books in your office which may make it conform to the actual facts of the case.

WITNESS: I will have to have the collector's book. You will have to give me some time to do that.

The COURT: If counsel want it, it will have to be done.

Mr. GORDON: I tried to get the whole thing in as far as I possibly could. If there are any mistakes, I want them corrected.

WITNESS: There is one item there. Mr. N. W. Bowe, for
36 reasons best known to himself, asked the privilege of returning on his individual return the capital in his business. This year I asked him to return it in his business instead of N. W. Bowe; so it would not appear as N. W. Bowe there.

By Mr. SMITH:

Q. In that case you did not tax him on the business of N. W. Bowe & Son according to the ad valorem system for those years where there is a blank?

A. In that case he preferred to return it, and the city was getting it, and, as long as he said he had his sons in the business, but the

capital was his individually, I allowed him to return it as an individual. The bill was not made out against N. W. Bowe and Son for the capital employed there, but made out against N. W. Bowe.

Q. Did N. W. Bowe and Son pay any license tax based on the ad valorem system for the years blank?

A. We never assessed anybody based on the ad valorem system.

Q. There is a tax based on the ad valorem system?

A. Not a city tax.

Mr. SMITH: I didn't say a city tax?

WITNESS: I am talking about a city tax.

Q. I say did you tax N. W. Bowe & Son for any tax on the ad valorem system for the years for which it is blank?

A. Did we tax them on the money, on the capital? Yes, sir. In the person of N. W. Bowe, we did.

Q. But not as N. W. Bowe & Son?

A. No, sir. We don't impose any license tax based on the value of capital.

Q. Then this sheet is correct as to N. W. Bowe & Son, if there is a blank, under the ad valorem system?

A. It would be correct technically, yes, sir.

By Mr. GORDON:

Q. As I understand, each one of these persons as shown by this sheet, were given the same license as private bankers, were they not?

A. Yes, sir.

Q. Now in making these assessments, did the finance committee, or did you as commissioner of the revenue and acting as ad-
37 viser of the finance committee, apply to these several persons for a statement either of their capital employed in their several businesses or the amount of business transacted by them, in order to assist you or the committee in making the assessments of the license tax.

A. No, sir.

Q. And classifying them?

A. No, sir.

Q. Then, as I understand it, these various assessments were made by the Finance Committee in an arbitrary way, based upon what they thought was right?

Col. ANDERSON: I object to that. We haven't said it was arbitrary.

The COURT: He is asking that. He is following out his line of investigation.

A. The Finance Committee is composed of eleven men, representing most all the interests in town, and most of them in a prominent way, and they have never said so, as to whether they thought they had sufficient information about it. I presume they thought that they did have sufficient information to warrant them acting intelligently. I had to presume that.

Mr. GORDON:

Q. Was there any evidence introduced before the committee in any manner as to the amount of business performed by these various persons who are assessed with private bankers' license, or the amount of capital used by them in their several businesses?

A. So far as I know, no evidence of that character was introduced, unless it was introduced in the case of Mr. Bradley and others in your appeal to the Finance Committee, at its second sitting to have their license tax reduced.

Q. As a matter of fact, Bradley & Co. have protested for several years against the imposition of this unusually large license tax upon them, have they not?

A. You reminded me that it was 1906 when you came instead of 1907. That being the case, I do not remember whether they protested for 1907 or 1908. I think the last protest was made by you, which you say was 1906. Then they have not made any protest in 1907 and 1908.

Q. But they have been contesting this matter with the city ever since?

38 A. Yes, sir.

Q. The Finance Committee have known for several years past, have they not, that this matter was being contested?

Col. ANDERSON: I object to that.

The COURT: That is going a little too far. The Finance Committee will be here to-morrow.

Mr. SMITH: Ask him if he knows.

By Mr. GORDON:

Q. Haven't you known for the last two years that this matter was being contested?

A. Yes, sir.

Col. ANDERSON: You have known that the city has increased the license every year?

Mr. GORDON: That shows by the statement.

The COURT: Don't interrupt him. You will have your say afterwards.

By Mr. GORDON:

Q. Mr. Hawkins, do you know who is conducting business in the city of Richmond as the Commercial Guarantee Co.?

A. W. L. Waring is the presiding genius. I think he is president of the company.

Q. Don't you know, and haven't you known for some years that Mr. Waring was doing the same general character of business as that that you say Bradley & Co. were presumed to be doing?

A. In the year 1907 he in person made representations to members of the Finance Committee, which were repeated in the me-ting of the committee, that he was not, and some of the Finance Committee claiming that they had satisfied themselves that he was not,

on top of that, the statement he made in person to the committee that he was not, induced them to fix his license at $200 instead of $800.

By Mr. SMITH:

Q. Wasn't doing what sort of business?

A. Lending money on furniture or salaries.

Q. Does the law either state or the ordinance make any distinction as to the collateral that you lend on when you are in the business of a private banker?

A. I don't think it does. The city ordinance does not.

39 By Mr. GORDON:

Q. How is the general run of business enterprises in the city of Richmond taxed by the city?

A. Merchants are taxed on the ad valorem basis alone.

Q. When you say merchants are you referring to such persons as dealers in groceries, clothing, hardware, dry goods, house furnishings, feed, grain, jewelry, furniture, installment goods, implement, railroad and mill supplies, harness, leather, boots and shoes, metals, machinery, fruits, meats, fish, vegetables, etc., etc.?

A. No, sir, not all of them; nearly all of them. There is a specific fish license. For instance, a man may be a grocer or merchant; he is taxed on his capital and he is taxed in addition to that a specific license for the privilege of selling fish or oysters; that is graded anywhere from ten to fifty dollars.

Q. Is it not a fact that this $800 license tax was imposed upon Bradley & Co., and these other persons in the first class, with the intention of prohibiting them from conducting business as private bankers in the city of Richmond?

A. I don't know that I could positively say for the Finance Committee that they proposed to do that. I don't know whether they thought they had a right to put the license to such an extent that it would make it a police regulation and drive them out or not. I don't know what their thought was along that line.

By Mr. SMITH:

Q. Don't you remember that at a meeting of the Finance Committee, at which I was present, in 1906, when they made the license $400.00, it was openly stated in the committee room that, if that didn't break them up, they would make it $800.00?

A. I don't recall it, but my own thought is that it was put there to be prohibitive.

Q. You heard that talk in the committee room?

A. I don't recall hearing that.

Q. You don't doubt it, do you?

A. No, sir.

Q. You don't doubt it?

A. No, sir.

Q. That was your object in advising them to put it at $800 to make it prohibitive?

40 A. I didn't advise them, but they asked the limit, and I told them.

Q. Your idea in recommending the limit was to make it prohibitive? You say you advised the committee?

A. They don't always ask me.

Q. Was there any avoidance of that issue, that they intended to make it prohibitive?

A. My own thought is that it was intended to be prohibitive?

By Mr. GORDON:

Q. Mr. Hawkins, was Mr. Pollard, of the firm of Pollard & Bagby, a member of the Finance Committee during the time that the 1906 and 1907 assessments were made?

A. Yes, sir.

Q. It is a fact, is it not, that the State license on private bankers is graduated according to the amount of capital employed in the business?

A. Over $5,000, yes, sir.

By Mr. SMITH:

Q. In other words, under $5,000, they are all the same, is that what you mean?

A. Yes, sir.

By Mr. GORDON:

Q. What is the license under $5,000?

A. Fifty dollars.

By Mr. SMITH:

Q. In fixing Mr. Bradley's license, was Mr. Bradley asked to appear before the committee, or asked any questions, before the $800 license was decided upon?

A. I think not, sir.

By Mr. GORDON:

Q. Is the business that is done under the private banker's license in the City of Richmond regulated by ordinance of the city or statute of the State?

A. There being no specific statement as to what a private banker may do, I have always taken it that it would follow the State law.

Q. Mr. Smith has asked you in regard to Bradley & Com-
41 pany's license. Were any of these other persons assessed with the $800 license, requested to appear before the committee before these assessments were made against them?

A. I think not, sir.

Q. Will you please give the names of the members of the Finance Committee?

A. I will get brother Crenshaw to answer that for me. He has a list with him. I will read it from that and answer the question.

Q. As you give them, will you please state the business in which they are engaged?

WITNESS: Do you want this committee as it was in 1907?
Mr. GORDON: Yes, sir; in 1907.
A. In 1907, from the board, S. H. Cottrell, wood and coal dealer; W. T. Dabney, cigar dealer; T. H. Ellett, capitalist; Barton H. Grundy, oil man, manufacturer's agent for oil; J. B. Wood, in office of general counsel of the Chesapeake & Ohio Railway Co. From the Common Council, R. H. Pollard, Jr., real estate agent; E. H. Spence, shoes, trunks, etc.; James E. Cannon, attorney at law; John P. Lea, attorney at law; G. K. Pollock, attorney at law; Morgan R. Mills, manufacturer's agent, I reckon.

Redirect examination.

By Col. ANDERSON:

Q. You were asked by my friends on the other side whether the object of placing this license at $800 or the placing of these parties in the $800 class, was to prohibit their doing this business. You said you thought personally that it was. Why do you think there was a desire to prohibit their doing business?

Mr. SMITH: We object to that.
The COURT: I think that is proper.
Mr. SMITH: We except.

A. I know, in connection with some of the parties, there had been a good deal of notoriety through the newspapers——

Mr. SMITH: Is that testimony?
The COURT: Go on.

42 WITNESS: There had been a good many cases reported in the newspapers——

Mr. SMITH: We object to any hearsay testimony.
The COURT: Don't say anything about the newspapers. Just tell what you know yourself.
WITNESS: The only way I would know about the cases in court would be through newspaper reports.
The COURT: You can state that owing to the notoriety of their business and character of their business. You can't say what was in the newspapers.
WITNESS: As evidenced by trials in court——
Col. ANDERSON: The court says that you can say on account of the notoriety of their business.
WITNESS: On account of the notoriety the business had obtained by trials in court of people who claimed that they had been imposed on by excessive charges of interest, etc.——
Mr. SMITH: Is that proper?

By Mr. SMITH:

Q. Did you hear the testimony?
A. No, sir, I saw it published in the newspapers. I don't attend the courts. I couldn't know of any court trial——

Mr. SMITH: Therefore, I don't think it is proper for him to put it in.

The COURT: I will let that go in on the ground that he is going to put the Finance Committee on to testify why they put this large tax on these people. It is with that understanding, that he will follow it up by the Finance Committee.

Mr. SMITH: We just note an exception.

WITNESS: I think it was that general knowledge that influenced the placing of this license at $800.00.

By Col. ANDERSON:

Q. General knowledge of those facts?

A. Yes, sir.

Q. You were asked if you knew that Bradley & Co. had been resisting this ordinance, or this license tax, for the last several years. Do you know whether or not, in response to that resistance, the city has steadily increased the license tax?

A. The license has been placed at the same for the last two years (1907 and 1908), at $800. That is as high as they could put it under the ordinance. That is the limit of the ordinance—notwithstanding the contest.

43 By Mr. SMITH:

Q. It is a fact that, if they chose to adopt another ordinance classifying them, they could put the first class as high as ten or twenty thousand or fifty thousand dollars, if they saw fit?

A. There is such a vast difference between that and $800. I would have to stretch out a long way to imagine the Council doing that?

Q. If it be true, as practically admitted by you, that, if $400 wouldn't stop them, they would make it $800?

A. Within the ordinance; but the ordinance was not changed to $800.

Q. But, isn't it to be supposed that, if the same spirit animates the Finance Committee, that, if $800 will not stop them, they will pass an ordinance making it $1,600 or $2,000, or something that will stop them? Isn't that your honest belief?

A. The Finance Committee is only eleven men out of forty in the Council. That would not be majority enough to make it $1,600. I haven't any right to suppose the Council will go to work and make it ten hundred or sixteen hundred or any other hundred.

Q. Don't you know that the sentiment of the Council is that, if $800 won't stop it, that they will have to make it higher still?

A. No, sir, I know nothing about the sentiment of the Council, except the Finance Committee.

By Mr. GORDON:

Q. Did you ever attempt to verify any of the newspaper talk that you say influenced the Finance Committee in making these assessments?

A. No, sir, except that I read the decisions of the court that were adverse to some of the gentlemen engaged in the business.

Q. Did you ever hear of any case that Mr. Bradley had in court, or anybody that he transacted business with?
A. I don't recall a case, sir.
Q. You don't know that he ever did have a case, do you?
A. No, sir, I do not.

By Mr. SMITH:

44 Q. Don't know that he ever had a decision of the court adverse to him?
A. No, sir.
Q. Yet they made his license $800 without knowing that?
A. He was put in the same family.

Witness stood aside.

F. W. CUNNINGHAM, a witness on behalf of the City of Richmond, being first duly sworn, testified as follows:

Examination in chief.

By Col. ANDERSON:

Q. Will you please state what your official position is?
A. Collector of City Taxes.
Q. What is your duty in relation to license taxes?
A. Collect them if I can.
Q. In the year 1907 did you receive any bills for license taxes against F. S. Bradley, doing business as Bradley & Co.?
A. Yes, sir.
Q. Did you collect any?
A. They failed to pay and were reported to the Police Court as having failed to pay.
Q. You reported him to the Police Court as having failed to pay?
A. Yes, sir, and there my duty ended in the matter.
Q. It has been testified to that certain named parties were placed by the Finance Committee in Class No. 1 of the license taxes, which imposed a tax of $800, I will ask the stenographer to read them to you and ask you please to say which one if any of those parties paid the $800 tax.

Mr. SMITH: We object.
The COURT: That hasn't got anything to do with Bradley.
Col. ANDERSON: If some paid without protest doesn't it bear upon the reasonableness of the amount?
The COURT: I suppose so.

A. Nobody paid it except Mr. Pollard, who paid a fourth of a year's license ($200.00) and discontinued business.

45 Cross-examination.

By Mr. SMITH:

Q. Mr. Cunningham, you know the fact that this license tax of $800 was intended to be prohibitive, don't you?
A. I don't know it; I believe it. I would like to state here that

the ordinance states that the Commissioner of the Revenue and Collector could be called on by the Finance Committee at any time, but I have never been called on in my life and know nothing in the world about the assessments.

Q. You are a money borrower, too, aren't you?

A. Yes, sir, sometimes, have you got any to lend?

By Col. ANDERSON:

Q. In reply to Mr. Smith, you have stated that you did not know, but that you believed this license was intended to be prohibitive?

A. Yes, sir.

Q. Why do you believe so?

A. From my own opinion about it and from the fact that the common rumor was——

Mr. SMITH: I object to common rumor.

WITNESS: I don't mean I know it positively.

Col. ANDERSON: You say you believe it and I ask you why?

WITNESS: I say I believe it because the license was put so high.

Col. ANDERSON: They haven't paid the license?

WITNESS: No, sir, and they are in business, too.

By Mr. SMITH:

Q. Do you know Mr. Bradley is one of those that does the business that you say common rumor charges that they do?

A. No, sir, I am collector of these license taxes. If they come in and pay, I give them their receipt; if they don't, I report to Mr. Crutchfield that these taxes haven't been paid, and they are in his hands.

Q. This common rumor was so vague that you didn't know to which ones it applied?

A. It may have been vague, but it was not so dense but that anybody who could run might read.

Q. But you don't know to which particular ones it applied? Whether to all or some few?

46 A. The general impression was it applied to all of them, every man who was assessed at $800.

Q. Did you ever hear that rumor against Mr. Bradley?

A. No, sir, never in my life, not personally.

By Col. ANDERSON:

Q. Not personally?

A. No, sir, not against the firm. I just heard it in a general way against all the parties engaged in that business.

By Mr. SMITH:

Q. As far as you know, Mr. Bradley may have been an exception to the rule?

A. Possibly so.

By Col. ANDERSON:

Q. You don't know that he was?

A. I don't know that he was or was not; but every man who paid the $800 was included in the general rumor business I was talking about.

By Mr. SMITH:

Q. Captain Cunningham, then, as far as you can judge, the Finance Committee fixed this license on a rumor?

A. I can't say a word about the Finance Committee.

Col. ANDERSON: I object to that. He wasn't there.

WITNESS: I never was at a meeting of the Finance Committee when they were considering taxes in my life.

By Col. ANDERSON:

Q. You testified that D. E. Pollard had gone out of business?

A. No, I did not.

Col. ANDERSON: So I understood you.

WITNESS: My testimony was that they paid $200, which they had a right to do under the ordinance, and said they discontinued business. I don't know anything further about it. That comes within the jurisdiction of the Commissioner of the Revenue if they kept on or if they have not.

Q. You didn't mean to say that they had discontinued?

47 A. I meant to say that the idea was that they had discontinued business. Mr. Pollard said it was too high, he couldn't afford to do business at that rate; he personally told me that, that he could not personally afford to do business at that rate. He told me——

Col. ANDERSON: I object to your saying what he told you. That has nothing to do with this case.

Mr. SMITH: You asked him the question.

Col. ANDERSON: I asked him whether he meant to say that Mr. Pollard had discontinued business.

WITNESS: I mean to say he said he had discontinued business, and he paid $200 for the time he was in the business.

By Col. ANDERSON:

Q. You don't know whether it is a fact that he has discontinued?

A. No, sir.

By Mr. SMITH:

Q. You do know that this $800 tax is out of all proportion to the amount of business done by these people as compared with other private bankers; that tax, so far as you can understand, was intended to be prohibitive?

A. I don't want to answer your first part of the question, because I can't do it; I don't know anything about it. As I said before, I believe the license was put at $800 to make it prohibitory.

Witness stood aside.

NOTE.—At 2 o'clock P. M. court adjourned until tomorrow, Wednesday, March 25th, 1908, at 10 o'clock A. M.

Second Day.

WEDNESDAY, *March 25th*, 1908.

Court met at 10 o'clock A. M., pursuant to adjournment of yesterday.

Whereupon, O. A. HAWKINS, a witness heretofore upon
48 the stand on behalf of the City of Richmond, was recalled for further

Cross-examination.

By Mr. GORDON:

Q. As to the general run of merchants, as to whom you stated they were assessed on the ad valorem basis, such as dry goods dealers, grocers, etc., etc., were any specific license taxes assessed against these persons by the City of Richmond for the year 1907?

A. As merchants, no, sir.

Q. Do you recall, or do you remember, that, when I appeared before the Committee on Finance in 1906, to protest against the imposition of these large assessments against certain private bankers, represented by my firm, that I called the attention of the committee specifically to the fact that the General Assembly had just enacted a law regulating the business of lending money on wages, salaries, furniture, etc.?

Col. ANDERSON: I object to that.

The COURT: This is a history of this legislation.

Mr. GORDON: It is a history of the legislation I am coming at now.

A. I don't remember that you specifically called their attention to it. I am cognizant of the fact that such legislation had been had, myself.

By Mr. GORDON:

Q. You knew of that fact?

A. Yes, sir.

Q. Do you know whether the members of the Finance Committee knew of it?

A. To say that I know that they did, I don't know, but I suppose, certainly, that some of them were familiar with it.

Col. ANDERSON: I object to that. I don't see how he can know what the committee knew.

The COURT: Let the answer go for what it is worth.

By Mr. GORDON:

Q. This sheet, which was introduced as a copy of the records from your office, shows that in 1905 the Realty Bond & Trust Company

was assessed with a specific license tax as private bankers of
49 $75.00. Did you know at that time that this company was engaged in the business of lending small sums of money at more than 6% interest, and on salaries?

Col. ANDERSON: I object to that.

The COURT: The same reason allows that—the history of the legislation.

A. No, sir.

By Mr. SMITH:

Q. Did you, or the committee, make any inquiries to ascertain that fact?

A. I did not. I couldn't tell you whether any members of the committee did or not.

Q. The committee relied on you, to a large extent, for the information upon which they based this license, as you have already stated?

A. I suppose in 99% of the cases on the book, they did not ask me for any information at all; their knowledge was about as great as mine on the matter, and they acted according to their own knowledge.

Q. And they called no witnesses before them?

A. Not that I know of.

Witness stood aside.

GEORGE S. CRENSHAW, a witness on behalf of the City of Richmond, being first duly sworn, testified as follows:

Examination in chief.

By Col. ANDERSON:

Q. What is your position, if any, in the city government?

A. Position of City Accountant and clerk of the Committee on Finance.

Q. Do you keep the minute book of the Committee on Finance?

A. Yes, sir.

Q. Have you the book with you?

A. Yes, sir (producing book). This begins September 5th, 1906.

Q. Will you please turn to the meeting of the committee in 1907, at which they assessed licenses for 1907?

50 A. I have it.

Q. What is the date of that?

A. March 11th, 1907.

Q. Does that minute show that they assessed licenses on that date?

A. Yes, sir; "A called meeting of the committee was held today in the office of the Commissioner of the Revenue for the purpose of assessing licenses for 1907." I have two items in here, put in under a suspension of the rules at that meeting, which were foreign to that matter. "The committee then proceeded to fix licenses for 1907,

and, after the completion of the task, adjourned." It is signed "J. B. Wood, Chairman."

Q. Have you any minute in the book showing any meeting of the committee for the purpose of hearing any protests against the license so fixed?

A. Yes, sir.

Q. Will you please turn to that and give the date of it?

A. At a meeting of the committee, held on March 25th, 1907, which was duly advertised, the minutes read as follows: "The committee reassembled at 8 P. M. to hear complaints concerning assessed licenses for 1907. After hearing all complaints concerning licenses, Mr. Cannon called up," etc. That just shows that the work was completed.

Cross-examination.

By Mr. GORDON:

Q. Was there any action by the Committee on Finance in regard to the assessment of licenses for the year 1907, subsequent to the 25th day of March, 1907?

A. There was some action in reference to specific licenses, that is, on the strength of appeals coming on, referred by the council, on the application of certain parties who felt that they were aggrieved.

Q. Will you please refer to those minutes of the committee?

A. I will have to go and get my index if that is the case.

Q. Did they have any reference to private bankers in 1907?

A. I think not.

Mr. GORDON: If you find you are mistaken, please come in and have your testimony corrected.

WITNESS: I will refer to the record and see.

51 Q. As I understand, then, the question of assessing licenses by the Finance Committee for the year 1907 was closed on the 25th day of March, 1907, except perhaps the consideration of certain matters arising on appeal to the Council?

A. Yes, sir.

Q. And those matters of appeal did not affect, as far as you remember, any private bankers?

A. No, sir, not that I remember.

By Mr. SMITH:

Q. You don't remember that they did?

A. That is what I mean. Probably I can change that and state it definitely. There was no appeal, as far as my recollection serves me, from the private bankers.

Mr. SMITH: If you find you are mistaken, you *came* come in and correct your testimony.

Witness stood aside.

BEN T. AUGUST, a witness on behalf of the defendant, at this time introduced by agreement, being first duly sworn, testified as follows:

Examination in chief.

By Mr. GORDON:

Q. What position do you hold in the city government?
A. City Clerk.
Q. You have been City Clerk for the last five years past?
A. Yes, sir.
Q. Please state whether or not there was ever any resolution, or ordinance, of the Council of the City of Richmond, providing for the publication of the tax ordinance of Feb. 13th, 1906, or the ordinance amending that ordinance, which was adopted in December, 1906?
A. No, sir, no special direction for publication of that particular ordinance; but all penalty ordinances are published under a provision of the charter under the ordinances of the city, the charter requiring all penalty ordinances to be published.
Q. Please refer, if you have the record, to any ordinance of the city regulating this subject generally (I am not talking about
52 the charter now, I am talking about ordinances) and give to the stenographer the section.
Q. That ordinance was not published by any direct order of the Council, nor did I publish it under any resolution, of the Council. I have generally been guided in publication really by the charter; but on page 32, section 4, "He shall publish in such manner as may be directed all reports and ordinances which he may be required by the ordinances to publish, and such other reports and ordinances as the City Council may direct, and he shall, in general, perform such other acts," etc. That is as to the duties of the City Clerk. That is chapter 7, section 4, page 32, of the City Code of 1899. That ordinance, when published, is really published under section 21 of the charter requiring all penalty ordinances to be published.
Q. And that was done by you under section 21 without any specific direction from the Council as to these particular ordinances?
A. Absolutely. Yes, sir.

Cross-examination.

By Col. ANDERSON:

Q. Does not section 9 of chapter 7 require you to publish an ordinances and joint resolutions that are of a public nature?
A. No, sir. I have never conceived it my duty to publish anything except penalty ordinances unless directed by the Council to make publication.
Col. ANDERSON: Will you read section 11 of chapter 7?
WITNESS: Section 11, chapter 7, of the City Ordinance: "These ordinances and joint resolutions thus certified, signed and enrolled shall be taken to be the records of the corporation, and the City Clerk shall cause all the ordinances to be published, and with them such of

the joint resolutions as are of a public nature, and have a continuing effect and use beyond the immediate occasion of their adoption."

That is simply to publish in book form.

Q. As a matter of fact, you did publish this tax ordinance which became a law February 13th, 1906, and the amendatory
53 ordinance of December 18th, 1906, for five successive days, as required by section 21 of the charter.

By Mr. GORDON:

Q. In order to refresh your memory, please state when the publication of the original ordinance of February 13th, 1906, was completed and when the publication of the amendatory ordinance was completed?

A. The amendatory ordinance of December 18th, 1906, publication for five successive days was made beginning March 22nd, 1907. The other one we published, beginning April 1st, 1907, for five successive days.

Witness stood aside.

Col. ANDERSON: If your honor please, I want to call for the production of the books of Bradley & Co. This, if your honor please, is an ordinance of the City of Richmond, imposing a license tax upon a given business and, while it is true that there is a penalty attached to the non-compliance with that ordinance, it is important to prove in this case that the person who is resisting the license does the very business that the license was intended to reach.

Your honor has forbidden me to prove by general knowledge the character of this business, and it is impossible for me to prove it without having the books produced in court. The books will show what the business is, and whether it comes under this license or not.

Mr. SMITH: The proper time for them to have called for the production of the books, if they had a right to do it, was when they were fixing this tax. They did not condescend to ask us any question then. This is a criminal prosecution now, with a penalty imposed upon these gentlemen if they violate the law, and that is compelling them to testify against themselves. You can't require them to produce any books. We decline to do it.

The COURT: That is true, Colonel. This is a criminal prosecution. You can't require a man to produce evidence against himself.

Col. ANDERSON: I except.

54 *An Ordinance*

(Approved December 18, 1906)

To Amend and Re-ordain Sections 5, 20, 23 and 24, of Chapter 13 of Richmond City Code, 1899, Concerning the Levying of Taxes as Amended by the Ordinance Which Became Law February 13, 1906, and to Validate Assessments and Other Acts Done Thereunder.

Be it ordained by the Council of the City of Richmond:

1. That sections 5, 20, 23 and 24 of Chapter 13 of Richmond City Code, 1899, as amended by the ordinance which became law February 13, 1906, be amended and re-ordained so as to read as follows:

5. All persons desiring to prosecute in the city any business as auctioneers, agents for the sale or renting of real estate, sub-agents for the sale or renting of real estate, commission merchants, traders, brokers, private bankers, keepers or ordinaries, houses of private entertainment, eating houses or cook shops, city scavengers, surveyors, title examiners (other than licensed attorneys), advertising agents, bill posters and distributors, and such other business as cannot in the opinion of the committee on finance be reached by the ad valorem system, shall pay a special license tax for the privilege of prosecuting such business. Such persons shall be divided into thirteen classes, and the tax to be paid by them shall be, if of the first class eight hundred dollars; second, six hundred dollars; third, four hundred dollars; fourth, three hundred dollars; fifth, two hundred and fifty dollars; sixth, two hundred dollars; seventh, one hundred and fifty dollars; eighth, one hundred dollars; ninth, seventy-five dollars; tenth, fifty dollars; eleventh, thirty dollars; twelfth, twenty dollars; thirteenth, ten dollars.

20. All theatrical performances, save at a licensed theater, or licensed room for public exhibitions, shall pay a tax of ten dollars per week; nor shall any such license be issued for a period of less than one week. Circuses or kindred exhibitions shall be divided into three classes, and pay a license tax for exhibiting within the jurisdiction of the corporate authorities of the city, which tax shall include the privilege of parading over the streets of the city
55 one time, if in first class, three hundred dollars per day; second class, two hundred dollars per day; third class, one hundred dollars per day.

If exhibiting outside of the jurisdiction of the corporate authorities of the city, the same license tax shall be charged for the privilege of parading over the streets one time, and every other public show, exhibition or performance, except in a theater, or licensed room for public exhibitions, shall pay a tax of ten dollars per week; but no tax shall be required on a performance consisting only of vocal or instrumental music or from a lecturer on any subject of literature, science or art, or from a mechanic or artist exhibiting a work, the product of his own invention, labor or skill, or a model illustrating

such work, or from a farmer or stock raiser exhibiting productions or stock of his own raising, and that the mayor may, in his discretion, dispense with the tax in the case of any performance, exhibition or show for a religious or charitable purpose exclusively. (See sec. 1032 Va. Code, 1904.)

23. Licenses for carts, trucks, automobiles and other vehicles, or for the privilege of keeping dogs, goats or other animals, and for the privilege of hawking or peddling as provided in section seventeen of this ordinance, shall be issued by the treasurer upon payment to him of the amount of tax as prescribed by the ordinances of the city. For every such license the following tax shall be paid: For every cart dray or wagon drawn by one horse or mule, seven dollars; if drawn by two animals, ten dollars; if drawn by three, fifteen dollars; if drawn by four, twenty dollars, unless the body of the vehicle be on elliptic, or on wheels with tires not less than four inches wide, in which case the tax shall be seventeen dollars and fifty cents; for a buggy kept for hire, five dollars; for a hack or any other four-wheel carriage drawn by two horses kept for hire, ten dollars; for automobiles and other horseless vehicles kept for hire, of seating capacity in addition to chauffeur, for four persons, or less, ten dollars; from five to eight persons, fifteen dollars; for nine or more persons, twenty-five dollars; auto-wagons, or other horseless vehicles used for hauling or delivery of merchandise of any description, ten dollars; for a male dog, one dollar; for a female dog, two dollars; for a male goat, two dollars; for a female goat, one dollar. Nothing in this section shall be construed to interfere with the police inspection of automobiles as provided by the ordinances of the city.

24. It shall be the duty of the committee on police, elec-
56 tions and schools, or its successors, to provide annually the tins and medals to evidence the payment of the licenses as prescribed in section twenty-three of this chapter, and section three of chapter forty of the Code of 1899, and to deliver the same to the auditor fifteen days before the beginning of the fiscal year. It shall be the duty of the auditor to charge to and deliver to the treasurer in bulk all dogs and goat medals, license tins for vehicles automobiles and other horseless vehicles and hawkers and peddlers, and to list and charge to the treasurer all licenses set out in section twenty-three and to require daily statements and settlements for all moneys received by the treasurer on account of any of the said licenses; and it shall be the duty of the treasurer to deliver to every party paying any of the licenses set out in section twenty-three the proper tag or tin to evidence the paym-nt of said license, in addition to a receipt for the amount paid.

2. All assessments of taxes and all assessments of licenses, and all other acts of every kind which have been made or done in compliance with the terms of the said ordinance which became law on the 13th day of February, 1906, entitled an ordinance to amend and reordain Chapter 13 of the Code of 1899, concerning the levying of taxes, are hereby confirmed and declared to be as valid and binding as they or like assessments and acts would be if done under this ordinance.

3. This ordinance shall be in full force from its passage.

An Ordinance.

(Became a Law February 13, 1906.)

To Amend and Re-ordain Chapter 13 of the Code of 1899, Concerning the Levying of Taxes.

Be it ordained by the Council of the City of Richmond:

That chapter 13 of the Code of 1899 be amended and re-ordained so as to read as follows:

1. There shall be levied and collected for each fiscal year the taxes following, to-wit:

2. On all real estate not exempt from taxation, one and four-tenth per centum of the value.

57 3. On all personal property, except such as is exempt from taxation, one and four-tenths per centum of the value, and herein shall be included money and credits, stock and capital invested, all shares of stock in any bank, and all shares of stock in any corporation doing business in the city upon the capital stock of which no tax is imposed. The taxes upon such shares of stock in any bank, located and doing business in the city, are to be paid by the cashier or principal officer of the company. The taxes upon all shares of stock shall be upon the market value of the same, and shall be assessed as taxes are assessed upon other moneyed capital. The provisions of this ordinance shall apply to the taxes for the year 1906, and every year thereafter.

4. On each male resident of the city a poll tax of fifty cents, to be applied only to the support of the public schools.

5. All persons desiring to prosecute in the city any business as auctioneers, agents for the sale or renting of real estate, sub-agents for the sale or renting of real estate, commission merchants, traders brokers, keepers of ordinaries, houses of private entertainment, eating houses or cook shops, city scavengers, surveyors, title examiners (other than licensed attorneys), advertising agents, bill posters and distributors, or any other business which can not be reached by the ad valorem system, shall pay a special license tax for the privilege of prosecuting such business. Such persons shall be divided into thirteen classes and the tax to be paid by them shall be: If in the first class, eight hundred dollars; secon-, six hundred dollars; third, four hundred dollars; fourth, three hundred dollars; fifth, two hundred and fifty dollars; sixth, two hundred dollars; seventh, one hundred and fifty dollars; eighth, one hundred dollars; ninth, seventy-five dollars; tenth, fifty dollars; eleventh, thirty dollars; twelfth, twenty dollars; thirteenth, ten dollars. But the special license tax so imposed shall not exempt any such business from the usual tax on capital employed in said business.

6. The taxes imposed by the preceding sections shall not include the privilege of selling by wholsesale or retail any wines or spirituous liquors, or a mixture thereof, except by apothecaries furnishing the same as medicines on the prescription of a licensed physician. For

any such privilege, a tax, in addition to all other taxes, shall
58 be imposed, and all persons desiring such privilege shall pay the sum of two hundred and fifty dollars per annum.

18. The committee on finance shall classify all persons, firms or corporations prosecuting, or proposing to prosecute any business assessed with a class tax; in performing which duty they may require the attendance and advice of the commissioner of the revenue, the city collector, or any city officer. They shall return such classification to the auditor on or before the 15th day of March. He shall promptly give notice, by due advertisement, in two or more of the city newspapers, that such classification is lying in his office, open to public inspection, and that at times and places therein to be specified, within the next ensuing ten days, the committee will meet to hear all persons, firms or corporations complaining of the license assessed against them. After such modifications as the committee may direct, a copy of such classification shall be immediately furnished to the commissioner of the revenue, who shall at once prepare two full and complete copies of all licenses assessed, one copy of which he shall deliver to the auditor and one copy to the city collector. No change in such classification shall afterwards be made, except upon the order of the City Council. Any person aggrieved by the action of the committee may appeal to the City Council at its next regular meeting; but thereafter no application for any change shall be entertained, except upon the recommendation of the committee on finance.

25. All taxes and licenses assessed, excepting those set out in sections twenty-three and twenty-four, shall be charged by the auditor to the city collector, and the city collector shall proceed to make bills and collect same and make returns to the auditor and treasurer as prescribed by the ordinances of the city.

26. Annual licenses shall expire with the last day of the fiscal year. If the business for which a special license tax is required be commenced after the beginning of the fiscal year, applications shall be made to the commissioner of the revenue, who shall, if such business be subject to a class tax, by authority of the committee on fianance, assign the applicant to their proper class, and report the amount of tax to the auditor and city collector. The tax upon the license shall be abated proportionally to the period of the year which has elapsed; provided, however, that in no case shall it be less than one-fourth of the annual tax.

59 28. The receipt of the collector, acknowledging payment of the license tax and reciting the character of the business authorized, shall be a sufficient license for prosecuting such business

29. The collector shall, upon the first day of April, proceed to collect all license taxes not previously paid; and any person liable to such taxes who shall prosecute his business after the first day of May without having paid such tax, shall be liable to a fine of not less than $1, nor more than $5, for every day of default. The offender, on failing to pay the fine imposed, may be imprisoned in the city jail for a term of not less than five nor more than thirty days. Whenever any fine so imposed, but not paid, the police justice, if he shall

not order the party to be imprisoned in the city jail, may, unless an appeal be taken forthwith, issue a writ of fieri facias for said fine, directed to the sergeant of the city. Such writ must be made returnable to the said police justice within sixty days from its issuance. The collector shall, on or before the first day of June, report to the police justice a list of all persons liable to such taxes and in default.

36. This ordinance shall be in force on and after February 1 1906.

S. B. WITT. [SEAL.]

A transcript from the record.
Teste:

WALTER CHRISTIAN,
Clerk of the Hustings Court of the City of Richmond.

Costs of this transcript, $28.00.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, Walter Christian, clerk of the Hustings Court of the City of Richmond, do hereby certify that notice of the application for the transcript of this record was duly given to the attorneys for the City of Richmond by the attorneys for Bradley & Co.

Given under my hand this 9th day of November, 1908.

WALTER CHRISTIAN, *Clerk.*

A copy—
Teste:

H. STEWART JONES, *C. C.*

60 Hustings Court of City of Richmond.

RICHMOND, VA., *January* 13, 1910.

BRADLEY & COMPANY
v.
CITY OF RICHMOND.

Opinion by Judge George M. Harrison.

In this case F. S. Bradley complains of a judgment rendered against him by the Hustings Court for the City of Richmond, to which the whole matter of law and fact was submitted, affirming a judgment of the police justice imposing upon him a fine of $25.00 and costs for conducting the business of a private banker without having paid the license tax of $800 assessed against him for the privilege.

The plaintiff in error contends that the council of the city of Richmond did not designate the daily newspaper in which the ordinance imposing the penalty in this case was to be published, and that although published five times in a daily newspaper, as the

charter requires, the ordinance is invalid for the lack of that designation. City Charter, sec. 21.

It is by no means clear that this provision of the charter has not been complied with. It is, however, unnecessary to consider
61 that question. The object of requiring publication was to give notice of the ordinance and of its penalty before the penalty was inflicted. The record shows that this end was fully attained. The ordinance was published five times, and the plaintiff in error had notice of it, and appeared by his counsel, as was his right under the ordinance, before the Finance Committee of the council and asked an abatement of the assessment against him. It is, therefore, apparent that the plaintiff in error was not prejudiced by the alleged failure of the council to designate the paper in which the ordinance was published. He has had and availed himself of every privilege or advantage that he could have enjoyed had the ordinance been published in exact conformity with his present contention.

Every other question raised in the petition for this writ of error has been repeatedly decided by this court adversely to the contention there made.

It is insisted that the ordinances and assessment thereunder are in conflict with sections 69 and 70 of the city charter. The alleged matter of conflict is that the city has imposed a license tax on the plaintiff in error, as a private banker, and has, at the same time, assessed an ad valorem tax on the capital employed in his
62 business.

This action of the city is not in conflict with its charter. There are numerous decisions of this court holding that a municipality possessing general powers of taxation, must determine primarily whether a particular business can be reached by the ad valorem system, and its discretion in the matter cannot be interfered with by the courts except in a case of plain departure from the constitutional requirement. The question is one of power and not of policy, so far as the courts are concerned. It cannot be said that the imposition of a license tax on the business of the plaintiff in error is a plain departure from the constitutional requirement. Under similar charters, such action on the part of city councils has been repeatedly sanctioned. Postal Telegraph-Cable Co. v. City of Norfolk, 101 Va. 125; Gordon Bros. v. Newport News, 102 Va. 649; N. & W. Ry. Co. v. Suffolk, 103 Va. 498; Ins. Co. v. City of Winchester, 3 Va. App. It is not double taxation to impose a license tax on a business and at the same time to tax the capital used by the ad valorem system. Morgan's Case, 98 Va. 812; Newport News &c. Co. v. Newport News, 100 Va. 161; Norfolk v. Griffith, 102 Va. 115.

It is further contended that the assessment in question is
63 in conflict with section 69 of the charter, which provides that taxes shall be equal and uniform upon all property real and personal.

The record shows that the plaintiff in error and ten other private bankers were put in the first class and each assessed with a license

tax of $800. Such license taxes are not contrary to the provision requiring equality and uniformity if all in the same class are required to pay the same tax. Ould &c. v. City of Richmond, 23 Gratt. 464; Commonwealth v. Moore, 25 Gratt. 951; Norfolk v. Norfolk Landmark, 95 Va. 564; Morgan's case, supra; Newport News &c. Co. v. Newport News *&c. Co. v. Newport News,* supra.

It is further contended that the ordinance and the action of the council committee under it were unreasonable, and on this account invalid.

The power of taxation, under our system of government, rests with the legislative and not with the judicial department, and its province cannot be invaded by the courts. Where the power to tax for revenue purposes exists, the amount of the tax is in the discretion of the legislative body, and it may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of such State or corporation may prescribe. If
64 the power is exercised in an unwise, unjust and oppressive manner to any particular class, the remedy, within constitutional bounds, is by an appeal, not to the courts, but to the justice and patriotism of the representatives of the people. Ould &c. v. Richmond, supra; Com'th v. Moore, supra; Norfolk v. Norfolk Landmark, supra; Woodall v. Lynchburg, 100 Va. 318.

It is further insisted that the ordinance and assessment are invalid because in conflict with section 170 of the Constitution of Virginia, providing for the imposition of license taxes on any business that cannot be reached by the ad valorem system.

In answer to this contention, we need only cite, without comment, the recent case of Insurance Co. v. Winchester, supra.

The position is taken that the ordinance and assessment are invalid because in conflict with section 168 of the State Constitution, which provides that all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

The provisions in the Constitution requiring equality and uniformity of taxation apply only to a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal
65 and uniform in the sense contended for. Helfrick's Case, 29 Gratt. 844. When sections 168 and 170 of the Constitution are read together it is clear that it was not intended to include a license tax upon a business in any of the provisions speaking of taxes on property. It was competent for the council to assign private bankers to different classes, and the plaintiff in error was required to pay no greater license tax than all others in the same class with himself. In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. Norfolk &c. v. Norfolk, 105 Va. 139. This has not been shown in the present case; on the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private

bankers who are put in a different class and assessed with a less license tax.

Lastly, it is contended that the ordinance and the assessment are in violation of the State and Federal Constitutions guaranteeing due process of law.

Chapter 13, sec. 15, of the City Code provides, that the Finance Committee, after making the classification, shall return the
66 same to the auditor on or before the first day of April, who is required promptly to give notice by due advertisement in two or more papers that such classification is lying in his office open to inspection, and that at times and places therein to be specified the Committee will meet to hear all persons complaining of the assignment made of themselves, but further providing the right of appeal to all persons feeling themselves aggrieved by the action of the Committee to the council of the city of Richmond. This remedy has been held to give the party aggrieved sufficient opportunity to be heard, and the plaintiff in error has availed himself of it. Ould & Carrington v. City of Richmond, supra. See also King v. Portland, 184 U. S. 61; Telephone &c. Co. v. Los Angeles, 211 U. S. 265.

There is no error in the judgment complained of and it is affirmed.

Affirmed.

67 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Thursday, the 13th day of January, 1910.

F. S. BRADLEY, Trading as Bradley & Co., Plaintiff in Error,
against
CITY OF RICHMOND, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Hustings Court of the City of Richmond on the 19th Day of October, 1908.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It — therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said Hustings Court.

A Copy,

Teste:

H. STEWART JONES, *Clerk.*

Defendant in error's costs:

Attorney's fee	$20.00
Clerk's fees	2.59
	$22.59

68 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Wednesday the 26th Day of January, 1910.

F. S. BRADLEY, Trading as Bradley & Co., Plaintiff in Error,
against
CITY OF RICHMOND, Defendant in Error.

Upon a Petition to Rehear.

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 13th day of January, 1910, and to grant a rehearing thereof, the prayer of said petition is denied.

A Copy,
Teste:

H. STEWART JONES, *Clerk.*

69 In the Supreme Court of Appeals of Virginia.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing printed record contained in fifty nine pages and one page of index, and nine additional manuscript pages, is a true and perfect transcript of the record of the suit in the case of F. S. Bradley, trading as Bradley & Co. against City of Richmond, remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the said case was heard tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 28th day of February, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk.*

STATE OF VIRGINIA,
City of Richmond, To wit:

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the

attestation of the above record of F. S. Bradley, trading as Bradley — Co. against City of Richmond, remaining in the clerk's office of the said court at Richmond, made by H. Stewart Jones, the clerk of said court, is in due form.

Given under my hand and seal this the 28th day of February, 1910.

JAMES KEITH, *President.*

STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the annexed writing, was, at the time of signing the same, President of said Court, duly commissioned and qualified.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Court at the City of Richmond, the 28th day of February, A. D. 1910.

H. STEWART JONES, *Clerk.*

70 United States Supreme Court.

BRADLEY & COMPANY, Plaintiff-in-Error,
against
CITY OF RICHMOND, Defendant-in-Error.

Assignment of Errors.

The plaintiff in error F. S. Bradley, trading under the name and style of Bradley & Company, assigns error to the judgment of the Court herein as follows:

I. That the Supreme Court of Appeals of Virginia erred in not holding that the ordinance entitled "An ordinance (approved December 18th, 1906) to amend and reordain Sections 5, 20, 23 and 24 of Chapter 13 of Richmond City Code 1899 concerning the levying of taxes as amended by the ordinance which became law February 13th, 1906, and to validate assessments and other acts done thereunder," being the ordinance which the plaintiff in error was charged with violating in not paying the taxes levied, imposed and assessed thereunder, is under Section 1, Article 14 of the Amendments of the Constitution of the United States unconstitutional and void, and under Section 10 of Article 1 of the said Constitution.

II. That said Court erred in refusing to hold said ordinance unconstitutional and void under the provisions of said Section 1. Article 14 of the said Amendments of the Constitution in that said ordinance denies to persons within its jurisdiction the equal protection of its laws and imposes a tax upon persons therein mentioned unequally and unjustly and arbitrarily, unreasonably and unjustly
71 fixes thirteen classes who shall pay different and unequal taxes, and fails to enact what persons or businesses shall constitute each class, or under what conditions or circumstances

each class shall pay the different sums mentioned in said ordinance and also imposes a double tax upon persons doing business as private bankers or who are engaged in the loan of money, in that it imposes a so called license tax and also taxes such persons upon the capital employed in their said business.

III. That said Court erred in refusing to hold said ordinance unconstitutional and void under the provisions of said Section 1, Article 14 of the said Amendments of the Constitution in that said ordinance abridges the privileges and immunities of citizens and persons and the plaintiff in error doing business in the City of Richmond in said State and prevents and prohibits persons lawfully engaged in loaning money from pursuing the said business or calling.

IV. That said Court erred in refusing to hold said ordinance unconstitutional and void under the provisions of said Section 1, Article 14 of the said Amendments of the Constitution in that said ordinance without due process of law deprives the plaintiff in error of property.

V. That said Court erred in refusing to hold said ordinance unconstitutional and void under the provision of Section 10, Article 1, of the said Constitution in that said ordinance impairs the obligation of contracts and is retrospective and retroactive.

VI. That the tax levied, imposed and assessed against the plaintiff in error under and pursuant to said ordinance was unconstitutional and void under the provisions of said Section 1, Article 14 of the said Amendments of the Constitution, in that he was unjustly and unreasonably discriminated against in the levying and imposition of the said tax and that the said tax was unjust and un-
72 equal in that all persons in the same or like business were not taxed equally and the plaintiff in error did not receive the equal protection of the laws.

VII. That the tax levied, imposed and assessed against the plaintiff in error under and pursuant to said ordinance was unconstitutional and void under the provisions of said Section 1, Article 14 of the said Amendments of the Constitution, in that it abridges the privileges and immunities of citizens and persons doing business in the City of Richmond in said State and prevents and prohibits persons lawfully engaged in loaning money from pursuing the said business or calling.

VIII. That the tax levied, imposed and assessed against the plaintiff in error under and pursuant to said ordinance was unconstitutional and void under the provisions of said Section 1, Article 14 of the said Amendments of the Constitution in that said tax was levied without due process of law and deprives plaintiff in error of property.

IX. That the tax levied, imposed and assessed against the plaintiff in error under and pursuant to said ordinance was unconstitutional and void under the provisions of said Section 10 of Article 1 of the said Constitution, in that the same was levied, imposed and assessed against the plaintiff in error under said ordinance which is retrospective and retroactive and impairs the obligation of contracts.

X. That the Court erred in affirming the judgment of the Courts

of Virginia fining the plaintiff in error for the failure to pay said tax.

I. HENRY HARRIS,
Attorney for Plaintiff in Error.

Office and Post Office Address, 320 Broadway, New York City.

73 [Endorsed:] United States Supreme Court. Bradley & Company, Plaintiff-in-Error, against City of Richmond, Defendant-in-Error. Copy. Assignment of Error-. I. Henry Harris, Attorney for Plaintiff-in-Error, 320 Broadway, Central Bank Building, Borough of Manhattan, New York City.

74 Copy.

Know all men by these presents, that we, F. S. Bradley, trading as Bradley & Co., as principal, and The Empire State Surety Company of New York as surety, are held and firmly bound unto the State of Virginia, in the sum of Five Hundred Dollars, ($500.00), to be paid to the said State of Virginia, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14 day of February, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately, at a Term of the Hustings Court of the City of Richmond, State of Virginia, in a suit depending in said Court between the City of Richmond, as plaintiff, and F. S. Bradley, trading as Bradley & Co., as defendant, a judgment was rendered against the said F. S. Bradley, trading as Bradley & Co., which judgment was affirmed by the Supreme Court of Appeals of Virginia, and the said F. S. Bradley, trading as Bradley & Co., having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of said last named Court to reverse the judgment in the aforesaid State, and a citation was directed citing and admonishing the City of Richmond to appear at a Supreme Court of the United States, at Washington within thirty days from date thereof.

Now, the condition of the above obligation is such, that if the said F. S. Bradley, trading as Bradley & Co., shall prosecute the appeal to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to re-

75 main in full force and virtue.

F. S. BRADLEY, TRADING AS BRADLEY & CO.
THE EMPIRE STATE SURETY COMPANY.
B.

Sealed and delivered in presence of
I. HENRY HARRIS.

Approved by
JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

76 [Endorsed:] United States Supreme Court. F. S. Bradley, trading as Bradley & Co., Plaintiff-in-Error, against The City of Richmond, Defendant-in-Error. Copy. Bond. I. Henry Harris, Attorney for Plaintiff-in-Error, 320 Broadway, Central Bank Building, Borough of Manhattan, New York City. Bond $500.00. Original received & filed Febr'y 14, 1910. H. Stewart Jones.

77 Know all men by these presents, That I, F. S. Bradley, doing business as Bradley & Company, of the City of Richmond, State of Virginia, as Principal, and The Empire State Surety Company, a legal corporation organized under the laws of the State of New York, locating and having its principal place of business in the City of New York, State of New York. and duly authorized by law to execute surety bonds in the State of Virginia, as Surety, are bound jointly and severally unto the City of Richmond in the penal sum of Five Hundred ($500.00) Dollars, lawful money of the United States to be paid to the City of Richmond, to which payment well and truly to be made and done, the said F. S. Bradley binds jointly himself, his heirs, executors and administrators, and the said The Empire State Surety Company binds itself, its successors and assigns, each and every one of them in the whole, jointly and severally firmly by these presents.

Sealed with our seals and dated this 14 day of February, 1910.

The conditions of this obligation are such, Whereas, the said F. S. Bradley doing business as Bradley & Company, was convicted by the Policy Court of the City of Richmond on the Eighth day of August, 1907 of a misdemeanor, in that he violated certain ordinance "Approved December 18, 1906 to amend and reordain sections 5, 23 and 24 of chapter 13 of Richmond City code 1899 concerning the levying of taxes," on information laid before said court, and thereupon the said F. S. Bradley was sentenced by police court to pay a fine of Twenty-five ($25.00) Dollars, and pay the costs of said prosecution, and

Whereas, the said F. S. Bradley thereafter appealed to the Hustings Court of the City of Richmond, which affirmed said judgment on the Nineteenth day of October, 1908, and

Whereas, the said F. S. Bradley thereafter appealed to the Supreme Court of Appeals at Richmond, which court affirmed said judgment, and rendered judgment accordingly on all of which judgments execution remains unpaid, and

Whereas, the said F. S. Bradley, doing business as Bradley & Company, has obtained a writ of error from the Supreme Court of Appeals of Virginia upon said judgment to the United States Supreme Court, and said court has granted stay of execution of said judgment until the final determination of said cause.

Now, therefore, if the said F. S. Bradley, doing business as Bradley & Company, shall abide the final order and judgment of the United States Supreme Court, of the Supreme Court of Appeals of Virginia, of the Hustings Court of Virginia, and of the Police Court of the City of Richmond, made, then this obligation shall be void, otherwise in full force and effect.

In witness whereof, I, the said F. S. Bradley, doing business as Bradley & Company, have hereunto set my hand and seal, and The Empire State Surety Company has caused this instrument to be signed by B. A. Ruffin, its Attorney in Fact, duly authorized to execute in its behalf by power of attorney.

Its corporate seal to be hereto affixed the day and year first above written.

F. S. BRADLEY, TRADING AS BRADLEY & CO.
THE EMPIRE STATE SURETY COMPANY,
By B. A. RUFFIN,
Attorney-in-Fact.

[Seal The Empire State Surety Company. Incorporated 1901. New York.]

78 The aforegoing bond is approved and accepted as a supersedeas bond in the matter of a writ of error herein to the Supreme Court of the United States, from the Supreme Court of Appeals of Virginia.

JAMES KEITH,
President of the Supreme Ct. of Appeals of Virginia.

79 [Endorsed:] Copy of within received Feb'y 14, 1910. H. R. Pollard, At'y for Def't in Error. U. S. Supreme Court. Bradley & Co., Plaintiff in Error, against City of Richmond, Def't in Error. Original. Undertaking as Supersedeas. I. Henry Harris, Att'y for Plaintiff in Error, 320 Broadway, New York City, New York. Bond $500. Received & Filed Feb. 14, 1910. H. Stewart Jones, Clerk.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of Appeals of Virginia, at Richmond, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of Appeals of Virginia, before you or some of you, between the City of Richmond and F. S. Bradley, trading as Bradley & Co., a manifest error hath happened, to the great damage of the said F. S. Bradley, trading as Bradley & Co., as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Supreme Court at Washington, D. C., U. S. of A., together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 20th day of March, 1910, that the record and proceedings aforesaid being inspected, the said Justices of the United States Supreme Court,

may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of February, in the year of our Lord one thousand nine hundred and ten,
81 and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States Circuit Court, Eastern District of Virginia.]

[L. S.] JOSEPH P. BRADY,
Clerk of the United States Circuit Court.

The foregoing Writ of Error is hereby allowed.

JAMES KEITH,
Chief President of the Supreme Court of Appeals of Virginia.

82 [Endorsed:] United States Supreme Court. F. S. Bradley, trading as Bradley & Co., Plaintiff-in-Error, against City of Richmond, Defendant-in-Error. Original. Writ of Error. I. Henry Harris, Attorney for Plaintiff-in-Error, 320 Broadway, Central Bank Building, Borough of Manhattan, New York City. To —— ——, Esq., Attorney for —— ——. Service of a copy of the within writ of error is hereby admitted. Dated Richmond, Va., Feb'y 14, 1910. H. R. Pollard, Attorney for City of Richmond. Writ of error received and filed Feb. 14, 1910. H. Stewart Jones, clerk.

83 By the Honorable President of the Supreme Court of Appeals of Virginia to the City of Richmond and to H. R. Pollard, Esq., City Attorney:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the City of Washington, D. C., United States of America, on the 20th day of March, 1910, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Appeals of Virginia, wherein F. S. Bradley, trading as Bradley & Co., is plaintiff-in-error, and you are the defendant-in-error, to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done in that behalf.

Given under my hand and seal at —— in the State of Virginia, this 14 day of February, in the year of our Lord 1910, and of the Independence of the United States, the one Hundred and Thirty-fourth.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest:

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

84 [Endorsed:] United States Supreme Court. F. S. Bradley, trading as Bradley & Co., Plaintiff-in-Error, against City of Richmond, Defendant-in-Error. Original. Citation. I. Henry Harris, Attorney for Plaintiff-in-Error, 320 Broadway, Central Bank Building, Borough of Manhattan, New York City. To —— ——, Esq., Attorney for —— ——. Due and proper & legal service of a copy of the within Citation is hereby admitted. Dated, Richmond, Va., Feb'y 14, 1910. H. R. Pollard, Attorney for City of Richmond.

85 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Appeals in the city of Richmond this 28th day of February, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia.

Plaintiff's costs: $33.92.

Endorsed on cover: File No. 22,120. Virginia supreme court of appeals. Term No. 516. F. S. Bradley, trading as Bradley & Co., plaintiff in error, vs. The City of Richmond. Filed April 22d, 1910. File No. 22,120.

No. 516.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

F. S. Bradley, Trading as Bradley & Co.,
Plaintiff in Error,
against
City of Richmond,
Defendant in Error.

IN ERROR FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiffs in error Bradley & Co. were convicted [Tr. p. 12] in the police court of Virginia of the violation of the ordinance [Tr. p. 43] requiring all persons mentioned in section 5 thereof prosecuting the businesses therein mentioned to pay a special license tax for the privilege of doing business, in not paying the license tax of $800 imposed on them by the finance committee of Richmond.

The justice allowed an appeal to the Hustings Court of Virginia [Tr. p. 12], where the judgment of the justice was affirmed [Tr. p. 13] and a writ of error allowed to the Supreme Court of Virginia [Tr. p. 11], where the judgment of the Hustings Court was affirmed [Tr. p. 50].

Section 5 of the ordinance in question is as follows:

> "Section 5. All persons desiring to prosecute in "the city any business as auctioneers, agents for the "sale or renting of real estate, sub-agents for the "sale or renting of real estate, commission mer- "chants, traders, brokers, *private bankers,* keepers "or ordinaries, houses of private entertainment, eat- "ing houses or cook shops, city scavengers, survey- "ors, title examiners (other than licensed attor- "neys), advertising agents, bill posters, and dis- "tributers, and such other business as can not in "the opinion of the committee on finance be reached "by the ad valorem system, shall pay a special tax "license for the privilege of prosecuting such busi- "ness. Such persons shall be divided into thirteen "classes, and the tax to be paid by them shall be, if "of the first class, $800; second, $600; third, $400; "fourth, $300; fifth, $250; sixth, $200; seventh, "$150; eighth, $100; ninth, $75; tenth, $50; elev- "enth, $30; twelfth, $20; thirteenth, $10."
>
> [Tr. p. 43.]

It appears by the evidence that in the year 1907, under this ordinance, the plaintiffs in error were taxed and placed in the first class of $800 [Tr. p. 19] *as private bankers* [Tr. p. 20] with eight others, while other private bankers were taxed at less rates [Tr. p. 21]. The reason why these persons were put in the first class was that it was thought they were lending money on furniture and salaries in contradistinction of those handling notes in the regular course of business [Tr. pp. 22-24]. The ordinance, however, makes no distinction.

There was introduced in evidence exhibit Henshaw No. 1, showing the names of the various persons taxed for license to do business *as private bankers* and also assessed *ad valorem* [Tr. pp. 25, 26, 27 and 28].

This classification was made pursuant to section 18 of the ordinance in question by the committee on finance [Tr. p. 46].

This exhibit shows the rate that private bankers were taxed for doing such business for the year 1907. It also shows the *ad valorem* on which each private banker was assessed. It appears therefrom that four private bankers were taxed for a license as low as $20 each; five, $100 each; one, $150; two, $200 each; eight, $30 each; seven, $50 each; three, $75 each, and one, $22.50, and eight, including plaintiff in error, were taxed $800 each. It further appears that the banker taxed $150 for a license was assessed on an *ad valorem* of $10,000; that another taxed $30 was assessed on an *ad valorem* of $10,000; another taxed $75 was assessed on an *ad valorem* of $5,000, while plaintiffs in error were assessed on an *ad valorem* of $1,000. That the Richmond Loan Company was not taxed at all for a license, but assessed on an *ad valorem* of $5,000. Thompson & Co. were not taxed for a license, but assessed on an *ad valorem* of $2,000. It also shows that no assessments on the *ad valorem* were made as to any of the bankers. It appears that under the said ordinance and laws of Virginia a citizen may be compelled to pay a license tax to carry on certain businesses and may also be assessed on capital employed in business, for the privilege of doing business. [Tr. p. 45.]

It also appears that the tax imposed *for a license* is not based on the value of the capital used in the business, and *that each of the persons mentioned in the said exhibit were given the same license as private bankers.* [Tr. p. 29.]

It further appears by the evidence that another reason why the plaintiffs in error and some others were put in the first class was the notoriety the business had obtained in the newspapers and by trials in court of people who claimed that they had been imposed upon. [Tr. pp. 33-34.]

The testimony in short shows that the plaintiffs in error were put in the $800 class as private bankers because they were loaning money on furniture, and which seems to have been disagreeable to the committee on finance, while others were taxed insignificant sums as private bankers although they had much larger capital.

The learned Supreme Court wrote no opinion on its affirmance of the judgment, but Mr. Justice Harrison of the Hustings Court wrote, in which he said that the record showed that the plaintiffs and ten other private bankers were put in the first class of $800 and therefore there was no inequality, and

> "That it was competent for the council to assign private bankers to different classes; that as the business of the plaintiffs in error was not *precisely the same* as 'the other private bankers' it could put plaintiffs (although assessed as a private banker) in a different class."
>
> [Tr. pp. 48-49.]

A motion had been made by defendants in error to dismiss or affirm upon the ground that this court was

without jurisdiction in that the question involved was settled by the decisions of this court.

The said motion was reserved by this court until the argument of the writ of error herein.

The plaintiff in error asserts that there is no decision of this court which forecloses this appeal; that upon the authority of this court, and upon principle, the judgments below cannot stand.

It is not disputed that the law is as expressed in the decisions of this court cited by the counsel for the defendant in error upon the motion to dismiss, but counsel for plaintiff in error affirms that they are not to be applied as contended for by the defendant in error. That the facts in the case at bar are wholly dissimilar to those cases; yet the principles stated in them when applied to the facts in this case require a reversal of the courts below.

The plaintiff in error maintains that the ordinance in question and the tax upon the plaintiff in error thereunder are clearly void as in violation of the 14th Amendment of the Constitution of the United States, for the ordinance grants the arbitrary power (as defined by this court) to the Finance Committee of the Council therein mentioned to tax plaintiff at its will; which ordinance made no classification of the person or business or defined the classes to be taxed and left the arbitrary exercise of the power of classification and thus taxing with said Finance Committee, who did not make any classification, but selected plaintiff in error and a few others and taxed them as private bankers $800, although plaintiff's capital was but $1,000, while other bankers with capitals of $20,000 and $10,000 each and other sums in

excess of plaintiff's capital were taxed $200 and less and some not taxed at all [Tr. pp. 26-27], an actual illustration of the arbitrary power given to and exercised by the Finance Committee.

POINT.

I.

THE ORDINANCES AND THE TAX IMPOSED ON THE PLAINTIFF IN ERROR WERE VOID AS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS; AND THIS COURT HAS JURISDICTION.

The ordinance in question is dated December 18th, 1906, and is found on page 43 of the transcript. Section five thereof provides that

> "All persons desiring to prosecute in the city any business as auctioneers, * * * *private bankers,*" * * *

and certain other businesses, fourteen in number.

> "shall pay a special license tax for the privilege of prosecuting such business."

And it further provides:

> "Such persons shall be divided *into thirteen classes,* and the tax to be paid by them shall be, *if of the first class,* $800; second, $600; third, $400; fourth, $300; fifth, $250; sixth, $200; seventh, $150; eighth, $100; ninth, $75.00; tenth, $50.00; eleventh, $30.00; twelfth, $20.00; thirteenth, $10.00."

Section 18 (page 46) provides that

> "*The Committee on Finance shall classify* all persons, firms or corporations prosecuting or proposing to prosecute any business assessed with a class tax."

Under and pursuant to these sections the plaintiff in error was taxed $800 as a private banker and was convicted and fined for not paying the same.

In this ordinance no persons or businesses are classed. It merely ordains that there shall be thirteen classes. What class an auctioneer or private banker or any of the persons mentioned are in is not specified, designated or defined; it prescribes no rule or regulation whereby any of the persons or their business may be classified or taxed as a class or under what circumstances or conditions any of the persons or businesses may be placed in any of the classes and required to pay either $800, the maximum amount, or $10.00, the minimum amount, of the tax.

The ordinance speaks of thirteen classes of license taxes and nothing more. Whether each business mentioned shall constitute one or the other of these classes; whether a certain number of each business shall constitute one or the other of these classes; whether a particular number of businesses mentioned grouped together shall constitute one or the other class, or whether one business or person alone engaged therein shall constitute one or the other of these classes is not defined or limited.

The ordinance is in effect and substance as if it read that the persons prosecuting such business mentioned therein shall pay from $10 to $800 as a tax for prosecuting the same, as the Committee on Finance shall see

fit, which is what the Committee on Finance did in the case at bar in taxing the plaintiff in error $800.

The Finance Committee could discriminate as it pleased; it could tax a person as a banker $800 if he had but a capital of $100; it could tax an auctioneer $800 if he had but a like amount of capital. If the banking or auctioneering business or any of the other businesses mentioned were prosecuted by a Chinaman or a negro, it could classify him in the first or thirteenth or any of the class of amounts, because he happened to be of such nationality or color. They could tax a banker any amount up to $800 because he happened to lend money on the security of furniture or salaries, or because he dealt in municipal or other bonds, or because he dealt with Chinamen or negroes, if such business was obnoxious to the committee. It could show favor or partiality to one or the other in the business mentioned, regardless of any consideration of business or capital used therein, by putting him in any class. It could tax John Smith $800 because it disliked his name and John Jones, who was in the same business, $20 because it liked his name.

In short, the business and persons mentioned in the ordinance were at the absolute mercy of the Finance Committee.

The testimony shows that this Finance Committee did just as it is claimed they could do under this ordinance. Exhibit No. 1 [Tr. p. 26] is a statement of the "Private Bankers' License and Capital of Private Bankers Assessed with *ad valorem* Tax by the City of Richmond," and it will be seen that the private banker, Thomas Branch, with a capital of $10,000, was taxed or charged

for a license $100 or 8th class; that W. S. Hutzler & Co., with a like capital, were taxed or charged $30 or 11th class; another with a capital of $5,000, $75 or 9th class; the Richmond Loan, with a capital of $5,000, was not taxed or charged for any license whatever, as likewise Thompson & Co., with $2,000 capital; that John L. Williams, with a capital of $20,000, was charged or taxed for a license $200 or 6th class.

The plaintiff in error, with a capital of $1,000, was taxed or charged $800 for a license, as well as eight others with but a like capital or in the 1st class; two others with a capital of $4,500 and $1,400 were charged or taxed $800 for a license; others are charged from between $20 to $200. So that some private bankers were not taxed at all for doing business and others were taxed indiscriminately. Yet each of these persons were given the same license to do business as private bankers.

It also appears as a fact that the State of Virginia grades the private banker's license tax according to the amount of capital over $5,000 employed in the business, and below $5,000 they are taxed $50, and that the license of $800 in the particular ordinance as to plaintiff in error was to prohibit them from doing business. [Tr. pp. 32-33.]

Here we find an actual illustration of the ordinance and how and why the Committee on Finance classified the persons.

The power given to the Committee on Finance to tax and classify the persons or businesses mentioned, and the tax by it on the plaintiff in error was a naked and arbitrary power as to such persons so engaged, neither

restrained nor guided, and offends the constitutional provisions above quoted.

The guaranty of the Constitution prohibits laws *which are capable of being exercised arbitrarily* and with discrimination and unjustly *and without regard to legal discretion.*

Yick Ho v. Hopkins, 118 U. S. 356;
Gulf & C. R. R. v. Ellis, 165 U. S. 150;
Connolly v. Union & Co., 184 U. S. 540;
Bell Gap R. R. Co. v. Pa., 134 U. S. 232-237;
Morton v. Mayor and Council of Macon, 111 Ga. 162.

See also City of Richmond v. Model Steam Laundry, 111 Va. Rep. 758, where the Supreme Court of Appeal of the state of Virginia, in a case decided subsequently to the one at bar, announces a view favorable to the contention of the plaintiff in error. The syllabus is as follows:

> "A city ordinance requiring a permit from the city council for the erection and use of furnaces and steam engines which prescribes no fixed rules for the conduct of the business applicable alike to all citizens who may bring themselves within its terms, and no conditions upon which such permit may be granted, and furnishing no rules by which an impartial exercise of the powers of the city council may be secured, but which confers upon the city council without regulation or control a purely arbitrary power to grant or refuse the permit and makes the violation of such an ordinance a misdemeanor, is obnoxious to the equality and uniformity clause of the constitution of the United States and hence is invalid."

And the learned court says:

> "The test of the validity of the law is not what has been done but what might be done under its provisions."

In the Yick Ho case, speaking of an ordinance as to the keeping of laundries which gave the power to the supervisor to grant or withhold a license to conduct such business, this court (after stating that it was not precluded from giving its own interpretation of the statute) said:

> "We are unable to concur in that interpretation (of the California courts that the ordinance conferred discretionary power on the supervisors) of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem to be intended to confer, *not discretion to be exercised upon a consideration of the whole case, but a naked and arbitrary power to give or withhold consent not only to places, but to persons.* * * * *The power given to them is not confined to their discretion in the legal use of the term, but is granted at their will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*"

And in distinguishing ordinances construed in former cases, the court said:

> "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform.
>
> "It allows without restriction the use for such purposes of buildings of brick or stone, but as to wooden buildings * * * divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business nor the situation and nature of adaptation

> of the buildings themselves, but *merely by an arbitrary line on one side of which are those who are permitted to pursue their industry by the mere will and consent* of the supervisors, and on the other side, those from whom that consent is withheld at their mere will and pleasure."

In endeavoring to sustain this ordinance the defendant in error cites a line of decisions of this court and of Virginia holding that certain laws applying only to a certain class of the people or businesses as applicable to the facts and the ordinance in question.

The ordinance in the case herein did not provide for any classification of persons or businesses mentioned therein, but such classification was delegated to the Finance Committee.

The defendant in error cites cases where laws were before this court which affected classes of persons, but such laws applied to all of the people affected and there was no undefined arbitrary power granted or delegated to officials as in the case at bar. In the tax cases the law fixed the tax and the duty of officials was but ministerial to fix the amount.

In Kentucky Railroad Tax Cases (115 U. S. 321) *the law* under consideration fixed the tax *on the value* of the railroad; the duties of the Board of Equalization were defined; they could not exercise any arbitrary power. The law in question in those cases *prescribed methods and means for ascertaining the value* of the real estate of *railroads* as a class upon which value the rate of taxation was levied, which was held to be no discrimination against them.

In the case of McMillan v. Anderson (95 U. S. 37),

cited in the above case, each business mentioned in the law was taxed a specific sum; the only question was the mode or manner of its collection. Mr. Justice Miller said:

> "The mode of assessing taxes in the state by federal government and by all governments is necessarily summary, that it may be speedy. *By summary is not meant arbitrary or unequal or illegal.*"

The case of Clark v. Titusville (184 U. S. 329) is clearly distinguished from the case at bar by the head note. This court holds that it was a tax

> "on the privilege of doing business *regulated by the amount of sales.*"

There is no regulation in the case at bar.

The ordinance in the case cited taxed merchants doing a business of $60,000 or over, $100; those doing a business of $1,000, $5, and so on by a regular scale of amounts. In other words, the ordinance provided that merchants should be taxed *by the amount or value of their sales.* The decision in that case was that thus classifying the tax by the amount or value of the business was proper. It cites the case of Magoun v. Illinois Trust Co. (170 U. S. 283), where the inheritance tax was fixed by *the law on the amount of the legacy.*

In Grundling v. Chicago (177 U. S. 183) the ordinance fixed the sum of $100 for the license, the power to grant which was vested in the mayor of the city, and in distinguishing it from the Yick Ho case, *supra,* the court said:

> "The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because with reference to the subject upon which it touched, *it conferred upon the munici-*

pal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected."

The case of Noble State Bank v. Haskell (219 U. S. 104) has no application. Under an act of the Legislature of Oklahoma banks were assessed *one per cent on average daily deposits,* for the purpose of creating a depositors' guaranty trust. The law fixed the assessment and all banks were thus assessed, and it held that the state could regulate the business of banking.

In the Engel v. O'Malley case (209 U. S. 128) the statutes of New York prohibited individuals from receiving deposits of money for safekeeping, etc., unless they received a license; the statute required them to deposit $10,000 and give a bond to obtain such license, excepting, however, national banks and others and specifying certain other exceptions.

The statute fixed the terms and conditions and the fee on which the license should be issued and the comptroller who issued them had no arbitrary power.

In the Southwestern Oil Co. v. Texas the statute applied to all wholesalers in oil, etc., who *were required to pay a tax of 20% on their gross receipts,* AND NO ARBITRARY power was vested in any person.

In the Brown-Forman case (217 U. S. 563) the statute fixed a tax of 1¼ cents on the wine gallon; no arbitrary power was granted to any person; but speaking of classification, Justice Lurton said:

"The rule on this subject *is that the mere fact of classification is not enough to exempt a statute from*

the operation of the equality clause of said amendment, but that in all cases it must appear that not only that a classification has been made, but that it is based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

On the other hand, in Gulf etc. v. Ellis (165 U. S. 150), a statute singling out railroads, requiring them to pay attorney's fees if defeated, was held to deny the equal protection of the laws. Speaking of the law as dealing with a class, Justice Brewer said:

> "Yet it is equally true that such classification can not be made arbitrarily (p. 155); that the penalty was not on all corporations. Only railroads of all corporations are selected to bear the penalty. The rule of equality is ignored."

And he further says:

> *"But arbitrary selection can never be justified* by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

The cases cited in the opinion of Mr. Justice Brewer at page 156 very aptly apply. He cites cases where it was held that the legislature might fix the age at which persons shall be deemed competent to contract for themselves, but that no one would claim that competency to contract can be made to depend on stature or color of hair, for such a statute would be arbitrary and a piece of legislative despotism; that a partial or private law which destroys individual rights is unconstitutional and were it otherwise, odious individuals and corporations would be governed by one rule and the mass of the community who made the law by another; that if a general

or special statute create distinctions or classes, the basis must be natural and not arbitrary; that clear and hostile discriminations against particular persons and classes, especially such as are of unusual character unknown to the practice of our government are obnoxious to the constitutional prohibition.

He also quoted and approved Bradley J. in what he said in Boyd v. U. S. (116 U. S. 616-635):

> " 'Constitutional provisions for the security of
> " 'the person and property *should be liberally con-*
> " '*strued,* for a close and literal construction de-
> " 'prives them of half their efficacy and leads to
> " 'gradual depreciation of the right as if it con-
> " 'sisted more in sound than substance. It is the
> " 'duty of courts to be watchful for the constitu-
> " 'tional rights of the citizens and against stealthy
> " 'encroachments thereon. Their motto should be
> " *'Obsta principiis'.*"

In Connolly v. Union Sewer Pipe Co. (184 U. S. at p. 561) this court condemned and held the Illinois statute void which enacted that any combination of certain businesses in restraint of trade was unlawful and criminal excepting, however, producers of agricultural products and live stock raisers, because of this exception and discrimination. Mr. Justice Harlan said, after quoting the statute:

> "The statute so provides, *notwithstanding persons engaged in trade or in the sale of merchandise and commodities within the limits of a state and agriculturists and raisers of live stock are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations applicable alike to all in like conditions as the state may legally prescribe.*

"The difficulty is *not met* by saying that, generally speaking, the state * * * may * * * make a *classification of persons,* firms, corporations and associations in order to subserve public objects. For this court has held *that classification must always rest upon some difference* which bears a reasonable and just relation to the act in respect to which classification is proposed, *and can never be made arbitrarily and without any such basis. But arbitrary selection can never be justified by calling it classification.*

"The equal protection demanded by the 14th amendment forbids this. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of a free government."

In Connolly case it was claimed that the Magoun case (170 U. S. 283) and the American Sugar Refining Cases (179 U. S. 89) were decisive of the question involved, but it was shown that the classification in the Magoun case was not arbitrary and that the tax was imposed according to the *value* of the property inherited and upon principles of equality; and in the sugar refining cases that imposing an *equal tax* upon *the business* of refining sugar and molasses was not unconstitutional *because it did not tax those who refined their own sugar or molasses.*

Judge Harlan further said in the Connolly case and his language is most fitting and appropriate to the facts in the case at bar:

"In prescribing *regulations* for the conduct of trade, it cannot *divide those engaged in trade into classes* and make criminals of one class if they do certain forbidden things while allowing another and favored class engaged in the same domestic trade to do the same things with impunity."

The cases therein cited point out the distinction which has been made of the cases cited by the defendant in error.

And in a case similar to the last quoted (Cotting v. Kansas City Stock Yards Co., 183 U. S. 79) it was unanimously held that a statute regulating the charges of stock yards, but excepting certain of them from its operation was repugnant to the Fourteenth Amendment in that it denied equal protection of the laws.

Counsel for defendant in error and the court below have endeavored to assimilate laws made in reference to a class of people with an ordinance which grants arbitrary power of selection to tax to a committee or to the council itself. It is tantamount to saying that because the committee selected the plaintiff in error to pay $800 he shall do so, regardless of the law. But, if it could be called a classification of private bankers, its exceptions and discriminations bring it within the rule of the Union Sewer Co. and Cotter cases.

In urging that the tax is not unconstitutional, the defendant in error claims that the plaintiffs in error could have appealed to the council if any error was made. But such right to appeal is entirely irrelevant to the question here presented. What the committee could do under the ordinance the council could do. There is no difference whether the council or its committee fixed the class in which the plaintiffs in error were placed. The ordinance is impregnated with the vice already shown whether the council or its committee acted and the right to appeal could not save it from that vice.

The ordinance in itself was arbitrary, fixed no basis of taxing, and the same arbitrary power was vested in the council as in the committee; the council could do as it pleased, regardless of the law.

The learned counsel for the defendant in error after exhaustively treating of class legislation in order to sustain the judgments below, cites a number of cases to the effect that this court will not decide questions of fact, but purely questions of law in the record and that they are pertinent because of

> "the vain attempt made in the evidence copied into the record to show that some unjust discrimination of private bankers was made as compared with the business of others similarly engaged."

There was no vain attempt to show this discrimination, it was a fact shown by the evidence to convict the plaintiff in error, and this evidence and fact was relied upon both by counsel for defendant in error and the court below to show that there was a legal classification and for the purpose of showing that the plaintiff in error was taxed. It is a conceded fact.

The fact cannot be rejected in determining the question of law any more than the fact that the plaintiff in error was taxed.

In the Yick Ho case the fact that licenses were issued to all others but Chinamen was a fact in the case which led to the determination of this court that the ordinance was void. That there was discrimination was a fact found and established by the record as well as the fact of the existence of the ordinance and the conviction of the plaintiff in error, and these facts bring up for review

the questions of law involved. Nevertheless the ordinance is an arbitrary one and void.

The record shows that the plaintiff in error did not have the equal protection of the laws within the meaning of the decisions of this court interpreting the Fourteenth Amendment.

THE JUDGMENT OF THE STATE COURTS SHOULD BE REVERSED.

Respectfully submitted.

I. HENRY HARRIS,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1911.

No. 259.

F. S. BRADLEY, TRADING AS BRADLEY & CO., PLAINTIFF IN ERROR.

vs.

THE CITY OF RICHMOND.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

In this matter, on Monday, April 24, 1911, the defendant in error submitted a motion to dismiss the writ of error because this Honorable Court was without jurisdiction, or to affirm the judgment complained of on the ground that it was manifest that even though the court had jurisdiction, yet the appeal had been taken for delay only, and the questions on which the jurisdiction depended were so frivolous as not to need further argument, and to sustain these motions filed a brief. These motions were, by an order of the court, continued for the hearing of the case upon the merits.

In the brief filed to sustain said motions an elaborate statement of what the record discloses is made, which might be relied upon as sufficient to meet the requirement of the rule and to give all information necessary for the proper understanding of the case,

but to facilitate the convenient examination by the court, the substantial facts of the case will be again recited here.

The writ of error is taken in a prosecution by the City of Richmond, Virginia, instituted in August, 1907, before the Police Justice of the said city charging that the plaintiff in error has violated an ordinance of the City of Richmond by failing to pay a city class tax assessed against him, in which prosecution judgment was rendered against him for the sum of $25.00 and costs (Transcript of Record, p. 12), from which judgment, an appeal was taken to the Hustings Court of the City of Richmond, where the said judgment of the Police Justice was affirmed, and the defendant in error recovered against the said plaintiff in error the said fine of $25.00 and the costs of the prosecution (Transcript of Record, p. 13), from which judgment in the said Hustings Court, a writ of error and supersedeas was awarded by the Supreme Court of Appeals of Virginia, and upon the hearing of the said writ of error and supersedeas in the said Supreme Court of Appeals of Virginia, on January 13, 1910, the judgment of the said Hustings Court was affirmed (Transcript of Record, p. 50). See 110 Va. p. 521, and 66 S. E. p. 872. From this judgment a writ of error and supersedeas was allowed to this Honorable Court on the 14th day of February, 1910 (Transcript of Record, pp. 51-7).

The grounds of error assigned to the judgment of the Supreme Court of Appeals of Virginia are ten (10) in number (Transcript of Record, pp. 52-53), presumably intended to be comprehended in one assignment of error set forth and relied upon in the brief of the learned counsel for the plaintiff in error, which assignment is in the following language:

"The ordinances and the tax imposed on the plaintiff in error were void as in violation of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws; and that this Court has jurisdiction."

The statutory provisions contained in the charter of the City of Richmond, relied on to show that the defendant in error was authorized to impose the license tax of which the plaintiff in error complains are as follows:

> "Sec. 69. For the execution of its powers and duties, the City Council may raise, annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and the United States." * * * Acts of General Assembly of Va., 1869-70, p. 138.
>
> "Sec. 70. The City Council may grant or refuse licenses, and may require taxes to be paid on such licenses, to agents of insurance companies whose principal office is not located in said city; to auctioneers; to public, theatrical or other performances or shows; to keepers of billiard tables, ten pin alleys and pistol galleries; to hawkers and peddlers in the city, or persons to sell goods by sample therein; to agents for the sale or renting of real estate; to commission merchants, and all other business which cannot be reached by the *ad valorem* system under the preceding section." * * Acts of General Assembly of Va., 1869-70, p. 138.

The ordinances of the City of Richmond passed in pursuance of these charter provisions are as follows:

> "5. All persons desiring to prosecute in the City any business as auctioneers, agents for the sale or renting of real estate, sub-agents for the sale or renting of real estate, commission merchants, traders, brokers, *private bankers*, keepers of ordinaries, houses of private entertainment, eating houses or cook shops, city scavengers, surveyors, title examiners (other than licensed attorneys), advertising agents, bill posters and distributors, *and such other business as cannot, in the opinion of the Committee on Finance*, be reached by the ad valorem system, shall pay a special license tax for the privilege of prosecuting such business. Such persons shall be divided into thirteen classes, and the tax to be paid by them shall be, if of first class, eight hundred dollars; second, six hundred dollars; third, four hundred dollars; fourth, three hundred dollars; fifth, two hundred and fifty dollars; sixth, two hundred dollars; seventh, one hundred and fifty dollars;

eighth, one hundred dollars; ninth, seventy-five dollars; tenth, fifty dollars; eleventh, thirty dollars; twelfth, twenty dollars; thirteenth, ten dollars." Record, p. 43.

"18. The Committee on Finance shall classify all persons, firms or corporations prosecuting, or proposing to prosecute any business assessed with a class tax; in performing which duty they may require the attendance and advice of the Commissioner of the Revenue, the City Collector, or any city officer. They shall return such classification to the Auditor on or before the 15th day of March. He shall promptly give notice, by due advertisement, in two or more of the city newspapers, that such classification is lying in his office, open to public inspection, and that at times and places therein to be specified within the next ensuing ten days, the committee will meet to hear all persons, firms, or corporations complaining of the license assessd against them. After such modifications as the committee may direct, a copy of such classification shall be immediately furnished to the Commissioner of the Revenue, who shall at once prepare two full and complete copies of all licenses assessed, one copy of which he shall deliver to the Auditor and one copy to the City Collector. No change in such classification shall afterwards be made, except upon the order of the City Council. Any person aggrieved by the action of the committee may appeal to the City Council at its next regular meeting; but thereafter no application for any change shall be entertained, except upon the recommendation of the Committee on Finance. (Transcript of Record, p. 46)."

"29. The Collector shall, upon the first day of April, proceed to collect all license taxes not previously paid; and any person liable to such taxes who shall prosecute his business after the first day of May without having paid such taxes, shall be liable to a fine of not less than $1, nor more than $5, for every day of default. The offender, on failing to pay the fine imposed, may be imprisoned in the city jail for a term of not less than five nor more than thirty days. Whenever any fine is so imposed, but not paid, the Police Justice, if he shall not order the party to be imprisoned in the city jail, may, unless an appeal be taken forthwith, issue a writ of fieri facias for said fine, directed to the Sergeant of the city. Such writ must be made returnable to the said Police Justice within sixty days from its issuance. The Collector shall, on

or before the first day of June, report to the Police Justice a list of all persons liable to such taxes and in default." (Transcript of Record, pp. 46-47).

Sections 20 and 105 of the charter of the City of Richmond are as follows:

"105. There shall be appointed by the City Council one Police Justice, who shall hold his office for the term of four years, and until his successor shall be elected and qualified, unless sooner removed from office. * * * * * The jurisdiction of the court shall extend to all cases arising within the jurisdictional limits of the City, of which a justice of the peace may take cognizance under the laws of the State, and to all cases arising under the charter or ordinances of the city." Acts of General Assembly of Va., p. 82.

Authority for the imposition of fines for the violation of ordinances is contained in section 20 of the charter of the City of Richmond, where it is provided as follows:

"20. Where, by the provisions of this act, the City Council has authority to pass ordinances on any subject, they may prescribe any fine or penalty, not exceeding five hundred dollars (except where a fine or penalty is herein otherwise provided for), for a violation thereof, and may provide that the offender, on failing to pay the fine or penalty imposed, shall be imprisoned in the jail of the said city for any term not exceeding three calendar months. Such imprisonment may be ordered to be with or without labor; when ordered to be with labor the Council may, by ordinance, declare what kind of labor shall be done for the city by such offenders, either at said jail or elsewhere in the said city. And the City Council may subject the parent or guardian of any minor, or the master or mistress of any apprentice, to any such fine for any such offense committed by such minor or apprentice. From any fine or imprisonment imposed, an appeal lies to the Hustings Court of the city as in cases of misdemeanor." Acts of General Assembly of Va., 1897-8, p. 543.

In addition to the foregoing provisions of the charter relative to trial for violation of city ordinances, it is provided concerning appeals in such cases, by section 4107 of the Code of Virginia, 1887, as amended by an act approved December 10, 1903 (Acts

of the General Assembly of Virginia, session 1902-3-4, p. 616) as follows:

> "The appeal shall be tried without formal pleadings in writing, and the accused shall be entitled to a trial by a jury in the same manner as if he had been indicted for the offence in the said court."

The record in this case shows that the trial by jury thus guaranteed to every defendant was expressly waived by the plaintiff in error, and by consent of parties "the whole matter of law and of fact is (was) submitted to the judgment and decision of the court." (Transcript of Record, p. 13).

Upon the trial of the case, both in the Police Court and in the Hustings Court of the City of Richmond, it was not denied, but admitted, that the plaintiff in error, under the firm name of Bradley & Co. (Transcript of Record, p. 19), had been regularly assessed with a license class tax of $800, for transacting business in the City of Richmond as a private banker, and that he had proceeded since such classification and assessment to prosecute his business without having procured a license so to do, his sole contention in the premises being that the ordinances of the city, and the action of the Committee on Finance of the City Council of the City of Richmond in making the classification were illegal and void, for the reasons set forth in his petition for an appeal from the judgment of the Hustings Court. It was also not denied, but admitted, that the plaintiff in error, though he knew of the action of the Committee on Finance in making the assessment against him, yet had not availed himself of the provisions contained in section 18 of the city ordinances hereinbefore quoted, which authorized any person aggrieved by the action of said committee to appeal to the City Council, at its next regular meeting, for redress against an erroneous or excessive assessment or classification.

The record further discloses that it was expressly provided by ordinance, that after the Committee on Finance had made the classification authorized by section 18, hereinbefore quoted, that they should return said classification to the Auditor of the city on or before the 15th day of March, and that he should give

notice by due advertisement in two or more city newspapers that the classification so made was lying in his office open to public inspection, and that "at times and places therein to be specified within the next ensuing ten days the committee will meet to hear all persons, firms or corporations complaining of the license assessed against them," and further that after any modification made by the committee a copy of the classification so required was to be furnished to the Commissioner of Revenue, etc., and that no change in such classification should afterwards be made "except upon the order of the City Council," but it was further provided that "any person aggrieved by the action of the committee may appeal to the City Council at its next regular meeting, but thereafter no application for any change shall be entertained, except upon the recommendation of the Committee on Finance."

It was shown in the evidence that the plaintiff in error knew of the classification made by the Committee on Finance, for the year 1907, and that he, by his counsel, Mr. Gordon, appeared and objected to the assessment (Record, p. 19). His objection was, as the record shows, overruled and instead of prosecuting his appeal before the Council of the City of Richmond, he preferred to resist the payment of the license tax, and that that attitude resulted in the institution of the prosecution and the legality of the culmination of that prosecution is the question now for the determination of this court.

The record further discloses that a vain effort was made in the evidence to show that the basis of the classification made by the committee should have been the capital of the several firms and persons assessed as liable to pay license taxes as private bankers, from which supposedly the argument was to be made, in fact is made in the brief of the learned counsel for the plaintiff in error on page 5, that the classification is *arbitrary* and *unjust* because not made upon an *ad valorem* basis, fixed with reference to the *capital* invested or used by the persons prosecuting the business of private bankers, and to justify this contention the learned counsel refers to page 45 of the Transcript of Record, as requiring that the amount of capital should be the controlling factor in fixing the license tax. Turning to the page referred to it will be seen that the ordinance there copied into the record provides by the several sections amended as follows:

(1) Section 2 fixes the rate of taxation on "all *real estate*, not exempt from taxation," at one and four-tenths per centum of the value.

(2) Section 3 does likewise in regard to "all *personal property*, except such as is exempt from taxation," and then proceeds *to* provide what shall be "included" (considered) as money and credits, stock and capital invested, all shares of stock in any bank," etc;

(3) By section 4 each *male resident* of the city is made liable to *a poll tax* of fifty cents; and

(4) By section 5 it is provided that *license taxes* shall be imposed on "all persons desiring to prosecute in the city any business as auctioneers, agents," etc., which section, however, appearing on page 45 of the Record, embodied in the ordinance of February 13, 1906, was subsequently amended by the ordinance approved December 18, 1906, p. 43 of Record, and as a consequence was the law in force at the time the plaintiff in error was assessed with a license tax for the year 1907, and is, *verbatim*, the section hereinbefore quoted.

There is not in this last mentioned section (5), *or in any other section, in connection with the imposition of city license taxes any provision, either express or implied, which requires the Committee on Finance to consider the question of the capital invested by persons of whom a license tax is exacted as an element to determine the amount thereof;* but, on the contrary, as shown in evidence by the Commissioner of the Revenue, the claim that the amount of capital was to serve as a basis for the assessment of an *ad valorem* license tax is purely a theory of the defense, unsustained by one particle of evidence, except the mere fact that the Commissioner of the Revenue, following the form provided for the assessment of State licenses, some of which as he testified are based upon the *ad valorem* system, in sixteen out of sixty-five cases placed opposite the name of the person to whom a city license was granted for the year 1907, the amount supposedly used by him in the transaction of his business. On page 21 of the Record he says, concerning this matter; "The Finance Committee don't know anything about capital when they

are assessing taxes," and again on page 29, he says: "We never assessed anybody based on the *ad valorem* system," and when asked if there was not a tax based on the *ad valorem* system, he answers: "Not a city tax," and on the same page, further on he was asked by counsel for the plaintiff in error the following question, and gave the following answer:

> "Q. Now in making these assessments did the Finance Committee, or did you, as Commissioner of the Revenue and acting as adviser of the committee, apply to these several persons for a statement either of their capital employed in their several businesses or the amount of business transacted by them, in order to assist you or the committee in making the assessments of the license tax?
>
> "A. No, sir."

The learned counsel seeking to deduce from this question and answer the arbitrary action of the Committee on Finance, asked another question to which the following answer was made: "The Finance Committee is composed of eleven men, representing most all the interests in town, and most of them in a prominent way, and they have never said so, as to whether they thought they had sufficient information about it. I presume they thought that they did have sufficient information to warrant them in acting intelligently. I had to presume that."

And when the same witness was asked whether any evidence was introduced before the committee in any manner as to the amount of business performed by the class known as "Private Bankers," in which the plaintiff in error was placed, answered: "So far as I know no evidence of that character was introduced, unless it was introduced in the case of Mr. Bradley and others in your appeal to the Finance Committee, at its second sitting to have your license tax reduced."

This last answer was the conclusion of this abortive effort to show that the Committee on Finance had considered the amount of capital used as the basis for their classification.

The evidence, however, does show that there was another and perhaps a controlling reason in the making of the classification in which the plaintiff in error was placed. That reason rests upon the fact that plaintiff in error belonged to the class of

private bankers, who, in the City of Richmond, were conducting the business of "lending money on furniture or salaries" at an exorbitant rate of interest (Record, p. 31).

Indeed this is the concessum of the learned counsel for the plaintiff in error in his brief, where on page 6, he says:

> "The testimony in short shows that the plaintiffs in error were put in the $800 class as private bankers because they were loaning money on furniture, and which seems to have been very disagreeable to the Committee on Finance, while others were taxed insignificant sums as private bankers, although they had much larger capital."

But there was shown to be another important element existing in the nature of the business conducted by the class to which the plaintiff in error belonged, which presumably had its influence upon the Committee on Finance in determining the amount of the class tax with which that class was assessed. It is embodied in an answer given by the Commissioner of the Revenue, Mr. Hawkins, to a question asked him, he says:

> "Well, sir, they were thought to be doing the business of lending money on furniture and salaries and *that class of business, at an excessive rate that has produced a great many cases in court in contra-distinction from the gentlemen who were handling notes in the regular course as the result of real estate loans and things of that kind.*"

He was then immediately asked the question:

> "In other words they were doing a different sort of business from the regular banking business?," to which he answered: "That is what was thought of it by the Committee. The Legislature, a few years ago, passed a law covering that case." (Record, p. 22).

To combat this evidence relative to the nature of the business conducted by the class to which the plaintiff in error was assigned, neither the plaintiff in error, nor any of his associates of his class, were introduced as witnesses. Indeed not one scintilla of evidence was offered in justification of the claim that the action of the committee was arbitrary.

All of the questions arising under this situation of the record were submitted to and passed upon by the Supreme Court of Appeals of Virginia adversely to the contention of the plaintiff in error, yet but one of them under the decisions of this court too numerous and familiar to be cited, remain open for consideration and review here, viz: That the ordinances under which the assessment of the class tax was made were in violation of the Fourteenth Amendment of the Constitution of the United States.

For the convenience of the court the defendant in error reiterates and amplifies the grounds on which its motion was made to dismiss or affirm the pending writ of error.

FIRST.

This Honorable Court is without jurisdiction.

It is a well established principle that where the soundness of a federal question so clearly appears from previous decisions as to foreclose the subject and leave no room for controversy, a writ of error awarded from a court of last resort of a State to this Honorable Court will be dismissed for want of jurisdiction. *Hannis-Distilling Co.* v. *Mayor and City Council of Baltimore*, 216 U. S. 285, 288.

In that case, as in this, the writ of error was directly from the court of last resort of the State, and was prosecuted upon the assumption that questions under the Constitution of the United States were involved, which gave a right to an immediate resort to this Honorable Court for solution, and the court, speaking through the present Chief Justice, said:

> "Upon the correctness of this assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to

be raised can be the subject of controversy." Citing *Leonard* v. *Vicksburg, etc., Co.*, 198 U. S. 416, 421, and cases cited; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324, 335; *McGilvar* v. *Ross*, 215 U. S. 70.

It is undoubtedly true that similar provisions in State statutes imposing taxes and in ordinances of municipalities imposing municipal taxes have been repeatedly under review in this Honorable Court on substantially the same charge of unconstitutionality as that preferred and urged here and now.

In the Kentucky Railroad Cases, 115 U. S. 321, it was established that where a State statute for raising public revenue gives notice of the proposed assessment to an owner of property to be affected, by requiring him at a time named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes the time and place at which this statement and estimate are to be considered, and when and where the party interested has the right to be present and to be heard; and which affords him opportunity to test the validity of the proceedings, does not deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States; and likewise held that such a law for the valuation of property and for the assessment of taxes thereon which provides for the *classification* of property subject to its provisions into different classes; which makes for one class one set of provisions as to modes and methods of ascertainment of value and as to the right of appeal, and different provisions for another class as to those subjects, so that the law shall operate equally and uniformly, denies to no person affected by it "equal protection of the laws" within the meaning of the Fourteenth Amendment of the Constitution of the United States.

This is a leading case on the subject of the right of a State or municipality to make a classification of persons and subjects of taxation, and the principles laid down therein have never been departed from.

More directly in point, however, is the case of *Clark* v. *City of Titusville*, 184 U. S. 329, where it was held that an ordinance imposing a license tax upon merchants in the city, which divides

them into classes according to the amount of their sales, does not violate the equality clause of the Fourteenth Amendment of the Constitution of the United States, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amount of their sales differ.

In *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 296, it is said:

> "There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In the classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. * * * And if the constituents of each class are affected alike, the rule of equality prescribed by the cases, is satisfied. In other words the law operates equally and uniformly upon all persons in similar circumstances."

Mr. Justice McKenna, closing the opinion of the court in the case, says:

> "All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed, and their illegality has never been questioned. We think the classification of the Illinois law was in the power of the Legislature to make, and the decree of the Circuit Court is affirmed."

In *Gundling* v. *Chicago*, 177 U. S. 183, 185, it was said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinances, because of the alleged arbitrary power of the Mayor to grant or refuse it. He made no application for a license, and of course the Mayor had not refused it, *non constat* that he would have refused it, if application had been made by the plaintiff in error. * * *
>
> "But, assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law or in that providing for the equal protection of the laws." * * *

At page 188, the court further says:

> "Regulations respecting the pursuit of a lawful trade or business are very frequent occurrences in the various statutes of the country, and to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose, that the property and personal rights of citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for federal interference."

Under a principle too well understood to require the citation of authority the court cannot presume that the action of the committee on Finance in assessing a license tax of $800 was arbitrary or without justification, for it is no objection to an ordinance imposing a license tax that it partakes of both the character of a police regulation and also that of a privilege tax for revenue purposes. It was so held in the case last cited on page 189, where Mr. Justice Peckham says:

> "It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorizes it fulfils the two functions, one a regulating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough and the enforcement of the ordinance violates no principle of the Federal Constitution."

In *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, Mr. Justice Harlan quotes with approval from the case of *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, the following language:

> "The provisions of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a

State from adjusting its system of taxation in all proper and reasonable ways. It may, if it choose, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products."

Concluding the opinion of the court, Mr. Justice Harlan says:

"It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or business for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that all wholesale dealers in specified articles shall pay a tax of a given amount on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, in the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the tax-payer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal Court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it."

In the case of *Brown-Forman* v. *Kentucky*, 217 U. S. 563, 573, it was held that a license or occupation tax imposed upon the business of compounding, rectifying, etc., distilled spirits is not invalid as denying the equal protection of the laws, because no such tax is exacted from either resident or non-resident distillers who neither rectify, compound, etc., their products, nor from rectifiers and blenders of other States and countries who vend in the State untaxed rectified or blended spirits, in direct competition with the spirits of local rectifiers or blenders; the court, speaking through Mr. Justice Lurton, saying:

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax."

In *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 354, the court said, speaking through Mr. Justice McKenna:

"We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But logical approximateness of the exclusion or inclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ..d. 238. And this necessarily on account of the complex problems which are presented to the government. Evils must be met as they arise, and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of State laws redressed by it."

The power to classify private bankers and assess each class alike was constitutionally and legally conferred upon the Committee on Finance of the Council of the City of Richmond, as determined by the case of Ould and Carrington, *supra*, and like cases following it to the present case; hence the legality of that delegation of power is not open for consideration in this court.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, decided at the present term of the court, it was distinctly held that the police power of a State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the State may prescribe.

So likewise in *Engel* v. *O'Malley*, 219 U. S. 128, it was held that the business of receiving deposits of money in small sums from time to time, until they reach an amount sufficient to be sent to other States or foreign countries is banking, and as such is

a proper subject for regulation in the exercise of the police power of the State. The statute in the last mentioned case required that a license from the comptroller be obtained by persons desiring to engage in the business of receiving deposits of money for safe keeping, or for the purpose of transmitting to another, or for any other purpose, and the court held that the possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim does not invalidate, under the Fourteenth Amendment of the Constitution, the requirement of the statute that before the business is engaged in a license shall be obtained, and although the statute provided that it should not apply to private bankers whose business is such that the average amount of each sum received is not less than $500, that this constituted no unjust discrimination. Mr. Justice Holmes, delivering the opinion of the court in the case, saying:

> "The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will, as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. * * * Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert. This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment, the State could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force."

Among those mentioned by the learned justice was that the comptroller might refuse licenses upon an arbitrary whim, no guides being given him for his discretion. This objection was disposed of in the following language:

> "But the nature and extent of the remedy, if any, for a breach of duty on his part, we think, is unnecessary to consider; for the power of the State to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the

requirement may be attached." Citing the case of *New York* v. *Van de Carr*, 199 U. S. 552, 561, 563.

In the case of *New York* v. *Van de Carr*, 199 U. S. 552, 561, (*supra*), Mr. Justice Day, speaking of the power to delegate to a board or committee within reasonable limits the right to grant or withhold permits where the same is within the power of the State, says:

> "But the power to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, and by this delegation of such power, even to a single individual, was sustained in *Wilson* v. *Eureka City*, 173 U. S. 32, and in *Gundling* v. *Chicago*, 177 U. S. 183."

Another pertinent case is *Broadnax* v. *State of Missouri*, 219 U. S. 285, 294, where Mr. Justice Harlan, delivering the opinion of the court, said:

> "Of course we take the statute as a local law to mean what the court (the State court) says it means. Nor is there any force in the objection that the classification, as shown by the statute, is arbitrary and unreasonable. The same methods and means are applied equally to all of the same class."

In this connection it only remains to be pointed out that the Supreme Court of Appeals of Virginia, speaking by Harrison, J., in deciding the case in that tribunal, said:

> "The record shows that the plaintiff in error and ten (10) other private bankers were put in the first class and each assessed with a license tax of $800. Such license taxes are not contrary to the provision requiring equality and uniformity, if all in the same class are required to pay the same tax." Citing *Ould, etc.* v. *Richmond*, 23 Gratt. 464; *Commonwealth* v. *Moore*, 25 Gratt. 951; *Norfolk* v. *Norfolk Landmark*, 95 Va. 564; *Morgan's Case*, 98 Va. 815; *Newport News, etc.* v. *Newport News*, 100 Va. 161; and *Norfolk* v. *Griffith-Powell Co.*, 102 Va. 115. The court adding: "That the power of taxation under our system of government rests with the legislature and not with the judicial department, and its provisions cannot be invalidated by the courts. Where the power to tax for revenue purposes exists the amount of the tax is in

the discretion of the legislative body, and it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of such State or corporation may prescribe. If the power is exercised in an unwise, unjust and oppressive manner to any particular class, the remedy within constitutional bounds is by appeal not to the courts, but to the justice and patriotism of the representatives of the people."

And further on, speaking of the alleged injustice of the classification made by the Committee on Finance, said:

"It was competent for the Council to assign private bankers to different classes, and the plaintiff in error was required to pay no greater license tax than all others in the same class with himself. In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which he alleges to be favored. *Norfolk, etc.* v. *Norfolk*, 105 Va. 139. This has not been shown in the present case; on the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax." (See Transcript of Record, p. 48-49; 110 Va. 521, 524).

As hereinbefore pointed out the plaintiff in error, it is true, made an effort to show that his business, which he alleges was discriminated against, was "precisely the same as that included in the class which he alleges to be favored," but he utterly failed, as was his duty, to show that the fact alleged had any real existence. He neither testified himself nor invoked the testimony of any person in his class to sustain his contention, fearing, no doubt, that facts would be brought out through him which would demonstrate that his business, which was shown by the prosecution to be that of "lending money at high rates of interest on furniture and chattels as security," was far from being the same as the business conducted by real estate agents and auctioneers as private bankers, who made loans at a legal rate of interest and upon real estate security.

Relative to the analagous contention made in the recent case of the *Mutual Loan Co.* v. *Martell*, (decided at the present term of the court), it was said by Mr. Justice McKenna:

"We have declared so often the wide range of discretion which the Legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the Legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the supreme judicial court took, and we think rightly took. The court said that the legislature might have decided that the dangers which the statute was intended to prevent would not exist in any considerable degree in loans made by institutions which were under the supervision of bank commissioners, and believed rightly that the business done by them would not need regulation in the interest of employees or employers, citing *State* v. *Wickenhoefer*, 64. Atl. 273, a decision by the Supreme Court of Delaware. See *Engle* v. *O'Malley*, 219 U. S. 128.

Legislation may recognize degrees of evil without being arbitrary, unreasonable or in conflict with the equal protection provision of the Fourteenth Amendment to the Constitution of the United States. *Lumber Co.* v. *Bank*, 207 U. S. 251; *Heath & M. Mfg. Co.* v. *Worst*, 207 U. S. 338.

"This court sustained a classification like that of the Massachusetts statute in *Griffith* v. *Connecticut*, 218 U. S. 563, where a statute of Connecticut, which fixed maximum rates of interest upon money loaned within the State to persons subject to its jurisdiction, was upheld as a valid exercise of the police power of the State; and a provision of the statute which exempted from its operation 'any national bank or trust company duly incorporated under the laws of the State, and pawnbrokers" was decided to be a legal classification." (Advance Sheets Supreme Court, January 15, 1912, No. 4, p. 75).

In the case of *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, also decided at the present term of the court, Mr. Justice White, speaking of the obligation resting upon a party alleged to be aggrieved, to seek the redress offered by the statute or ordinance, uses this pertinent language:

> "The court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them. A law cannot be declared invalid because, in the opinion of the court, it does not accord with sound policy. The appeal for redress in such case must be to the lawmaking power." (Advance Sheets Supreme Court, February 15, 1912, No. 6, p. 156).

So far from the plaintiff in error showing by the record that he sought redress against an erroneous assessment by making to the City Council objection to the assessment which the ordinance clearly gave him the right to do, it is shown that he did not make such application and failed to pursue the relief offered and proceeded to do business in violation of the ordinance, and determined to rely upon making a defense to the criminal prosecution for conducting his business in violation of the ordinance. As is said in the last above quoted case, *non constat* had he appealed to the City Council, as was his absolute right, he would not have had his grievances redressed. This remedy he contumaciously rejected, and having done so claims that he was denied due process of law under a system of taxation approved by the highest tribunal of the State as far back as 1873. See *Ould and Carrington* v. *City of Richmond*, 23 Gratt. 464, approved by a continuous line of cases, from that time to the present time, too numerous to be cited, a list of which will be found in the case of *Norfolk & Western Ry. Co.* v. *Town of Suffolk*, 103 Va. 498, 499, 500.

Defendant in error, therefore, humbly submits that this decision and these deliverances of the Supreme Court of Appeals of Virginia, read in connection with the line of cases herein last above cited from this Honorable Court, show that the present case is

substantially on all fours with the case of *Hannis-Distilling Co.* v. *Baltimore*, *supra*, where the writ of error was dismissed, on the ground that the court was without jurisdiction, inasmuch as the question on which it rested was "manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy," the court further saying:

> "Beyond the dispute in the *Carstairs* case, the court of last resort of Maryland upheld the act here in controversy as an exertion of the taxing power of the State, and in so doing declared that it but reiterated and re-expounded rulings by it previously made. It follows that as for the purposes of the review by this court of alleged questions concerning the repugnancy of the taxing act to the Constitution of the United States the decisions of the State court maintaining under the State Constitution the validity of the taxing power which the act exerted was binding upon this court; it must result that the contentions to the contrary are so devoid of merit as to present no Federal question."

In the light of the situation in the case under advisement and the authorities hereinbefore cited, it is submitted that the writ of error should be dismissed for want of jurisdiction.

SECOND

Although the record may show that this Honorable Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument.

In the recent case of *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 36, 49, the line of demarcation between the principles controlling the court in the determination of the motion to dismiss for want of jurisdiction, and to dismiss on the ground stated under this head was clearly stated by the presiding Chief Justice, who there said:

"We primarily dispose of a motion to dismiss, which is rested upon the ground that a Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and, therefore, not adequate to confer jurisdiction. The contention may not prevail, even though it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous."

The converse of the proposition thus stated must be true, viz.: That where it appears that the appeal was taken for delay, or that, though the expounding and analyzing of familiar decisions be necessary, yet where that shows the practical unanimity of the decisions upon the issue presented, the court will affirm the judgment of the court below as plainly right.

I therefore maintain on behalf of the defendant in error the two following propositions:

1. *The record discloses the fact that the writ of error was resorted to for delay only.*

The judgment now complained of was rendered in the Police Court of the City of Richmond on August 8, 1907, and from that judgment appeal was taken to the Hustings Court of the City of Richmond, where the trial took place in October, 1908. There the judgment of the Police Court was affirmed and from which affirmance a writ of error and supersedeas was allowed to the Supreme Court of Appeals of Virginia on December 3, 1908, where on January 10, 1910, the judgment of the Hustings Court was affirmed, from which judgment the plaintiff in error obtained a writ of error and supersedeas to this Honorable Court on January 28, 1910, where the record was filed April 22, 1910. (See Transcript of Record, pp. 12, 13, 11, 50, 51, 52 and 58).

After the filing of the record in the clerk's office of this Honorable Court, no action was taken by the plaintiff in error to have

the record printed, hence it became necessary for the defendant in error to have it printed, so that this motion might be submitted.

It thus appears that the defendant in error has been unable to enforce the payment of the license tax of $800, due it for the year 1907, to which presumably must be added like assessments for the years 1908, 1909, 1910 and 1911, by reason of defenses set up by the plaintiff in error and brought to the attention successively of four different tribunals having jurisdiction in the premises. This fact, taken in connection with the fact that the record discloses that eight other private bankers, assessed with like license taxes, are making the same defenses and relying upon the result of this controversy, and, in the meantime, what the legislative branch of the government conceived to be a proper regulation of a certain class of private bankers, as well as the collection of a substantial revenue, from said licenses, is suspended, while the plaintiff in error brings under review constitutionl questions, determined adversely to his contention by the Supreme Court of Appeals of Virginia, more than a third of a century before, in the leading case of *Ould and Carrington* v. *Richmond*, 23 Gratt. 464, where substantially all of the contentions made, other than the claim that the ordinance was violative of the Fourteenth Amendment of the Constitution of the United States had been put at rest, and does this in the face of the fact that a continuous line of cases had again and again reiterated the soundness of the holding in the principal cases.

The doctrine invoked under this head is embodied in the maxim *stare decisis et non quieta movere.*

Of this doctrine it is said:

> The principle embodied in the maxim has been for centuries recognized and acted upon in English law. As early as A. D. 1454 there was a judicial declaration as to the necessity of respecting the authority of decided cases. The doctrine of *stare decisis* owes its origin and observance to the recognition of the necessity for stability and uniformity in the construction and interpretation of the law. It is too evident to require discussion that the interests of the State and of the individual and the proper administration of justice require that there should be settled rules in these matters. The application

of the doctrine necessarily cannot be according to fixed rules, but must be determined in each case by the discretion of the court. It has been stated that decided cases bear the same relation to the science of the law that a convincing series of experiments bear to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon according to their character, either as confirming an old or forming a new principle of action. They are continually multiplying throughout the whole extent of the court's jurisdiction and form the basis of a claim to numerous and valuable rights, offensive and defensive. The doctrine, as its name shows, has only to do with direct and controlling decisions, especially precendents for future cases, involving the same or similar issues. Its application is in no way affected by dicta." 26 Am. and Eng. Enc. Law, p. 160-1.

The able judge of the Supreme Court of Appeals in delivering his opinion, after disposing of the technical objection relative to the advertisement of the ordinance under which the license tax was levied, (which was held to be wholly without merit) uses this language:

> "Every other question raised in the petition for this writ of error has been repeatedly decided by this court adversely to the contention there made." (Record, p. 48).

It cannot be supposed that the learned counsel for the plaintiff in error was unacquainted with the repeated decisions referred to by Judge Harrison, or that he was not familiar with the repeated decisions of this court which of necessity, under the doctrine here invoked, precluded a further examination of the question presented by this writ of error, hence unless delay was the *dernier ressort* of the plaintiff in error a writ of error would not have been sought. The situation seems to preclude any other motive.

2. *It is manifest from an analysis of the prior decisions in this and kindred cases, that, applying the principles settled by the cases which have gone before, the contentions now advanced are wholly without merit and therefore do not require further argument.*

The attention of the court is specially called to the opinion of the Supreme Court of Appeals of Virginia in the case under argument, found at pages 47-50 of the Transcript of the Record. By a comparison of this opinion with the opinion of the same court in the case of *Ould and Carrington* v. *City of Richmond*, 23 Gratt. 464, it will be seen that the questions presented in the present case were identical with those presented in the *Ould and Carrington case.*

In the case of *N. & W. R. R. Co.* v. *Goddin*, 94 Va. 513, 515, it was said:

> "At the time the writ of error in the case before us was awarded, the constitutionality of section 1292 had been twice passed upon in this court, and it was no longer a debatable question. The test of 'good faith' does not fully meet the difficulty. Counsel and parties may, with perfect good faith, ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? See 2 Enc. of Plead, and Pr., p. 40-41; *Virden* v. *Allen*, 107 Ill. 505; *Chaplin* v. *Highway Commissioners*, 126 Ill, 264. Applying this test, it is plain that the constitutionality of section 1292 is not an open one in this court. It is no longer 'debatable.'"

No State court of last resort in this country has been more pronounced, than has been the Supreme Court of Appeals, in enforcing the maxim, *interest republicae ut sit finis litium*, and consequently upon the principles stated in the foregoing quotation, that court would have dismissed the writ of error in this case, when it was before it, from the Hustings Court, but for the Federal question in the record, and it is fair to presume that, inasmuch as the record presented to them indicated clearly the purpose of the plaintiff in error to raise and to have determined a Federal question, not only by that court, but by this, it was important that the court here should fully see the views of the court below as to the merits of the controversy, as well as its construction of the ordinance, the legality of which was challenged as in conflict with

the Federal Constitution. As hereinbefore pointed out, the Supreme Court of Appeals has consistently and continuously adhereed to the principles settled in the *Ould and Carrington case*, saying in this case:

> "Chapter 13, Sec. 15 of the City Code provides, that the Finance Committee, after making the classification, shall return the same to the Auditor on or before the first day of April, who is required promptly to give notice by due advertisement in two or more papers that such classification is lying in his office open to inspection, and that at times and places therein to be specified the committee will meet to hear all persons complaining of the assignment made of themselves, but further providing the right of appeal to all persons feeling themselves aggrieved by the action of the committee to the Council of the City of Richmond. This remedy has been held to give the party aggrieved sufficient opportunity to be heard, and the plaintiff in error has availed himself of it. *Ould and Carrington* v. *City of Richmond*, *supra*. See also *King* v. *Portland*, 184 U. S. 61; *Telephone, etc., Co.* v. *Los Angeles*, 211 U. S. 265." (Transcript of Record, p. 50; 110 Va. 521, 526).

Nor has this Honorable Court been less persistent in recognizing and enforcing the salutary maxim above quoted, under conditions like those presented here.

In *Wright* v. *Sills*, 2 Black, 544, 545, it was said:

> "Whatever difference of opinion may have existed in this court heretofore in regard to these questions, or may now exist, if they were opened for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhaustive in the earlier cases. It can subserve no useful purpose again to examine the subject. The decree of the court below is affirmed."

And, again in *Minnesota, etc., Co.* v. *National, etc.*, Co., 3 Wall. 332, 334, it was said by Mr. Justice Grier:

> "Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgments."

The court below on the Federal question cited the two following cases from this court, as sustaining its decision, namely, *King* v. *Portland*, 184 U. S. 64, 70, where it was held that a party cannot be heard to complain that his property had been taken without due process of law, where, by the decisions of the court of last resort of a State, he has the right of injunction against the collection of illegal taxes, though no opportunity to be heard is given in the statute levying the taxes; and the case of *Telephone, etc., Co.* v. *Los Angeles*, 211 U. S. p. 265, 281, where this Honorable Court, speaking through Mr. Justice Moody, approved a deliverance made in the case of *Sweet* v. *Rechel*, 159 U. S. 380, 392, it was said:

> "But, in determining whether the Legislature, in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

Mr. Justice Moody adding:

> "It is to be taken into account in considering this, as well as other questions, that the applicant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly, and that there is no suggestion in the case at bar, that the rates actually fixed were so low as to operate as a practical confiscation of property."

To these two decisions, relied on by the court below, many others might have been added, among them the case of *Illinois Central R. Co.* v. *Commonwealth of Kentucky*, 218 U. S. 551, 561, which is pertinent. In this case the court quotes with approval from the opinion of the Court of Appeals of Kentucky, where it was said:

> "A final assessment had been had, as provided by law, and if any injustice was done the tax-payer, it was due entirely to

his failure to appear before the board and ask a reduction of the assessment. Ne reliance could be placed in such proceedings, if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do, and not upon their undisclosed purposes."

Concerning which this Honorable Court uses the following language:

"This construction of the powers of the State officers under the statutes of the State relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the State; it was, under that law, a final assessment, and no ground is shown here for impugning it."

The pertinency of this authority will become more apparent when the court considers the vain attempt made in the evidence copied into the record to show some unjust discrimination in the making of the classification of private bankers, as regards their business, compared with the business of others similarly engaged.

To such contention it is sufficient to answer, as was done, where a like contention was made in the case of *King* v. *W. Va.*, 216 U. S. 92, 100:

"It is hardly necessary to add that on a writ of error we do not deal with the facts." Citing *Behn* v. *Campbell*, 205 U. S., p. 403.

In the case of *Iowa* v. *Rood*, 187 U. S. 87, 92, it was said:

"The mere fact that the plaintiff in error asserts title under a clause of the Constitution or an act of Congress is not, in itself, sufficient unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color of such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of things might be brought here simply for delay or speculative advantage." Citing *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336.

The case of *Equitable Life Asso. of U. S.* v. *Brown*, 187 U. S. 308, 314, is one of interest as determining the practice which should prevail on the motions here submitted under the surrounding circumstances. It was there said:

> "From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of facts upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so the case is brought directly within the rule announced in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited. It is likewise also apparent from analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, 132 U. S., 210; *Richardson* v. *Louisville & N. R. Co.*, 169 U. S. 128; and *Blyth* v. *Hinckley*, 180 U. S. 388. This being the case it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect to finally dispose of this controversy. The question then is: To which of the motions should the decree which we are to render respond? As this is a case governed by the principles controlling writs of error to State courts, it follows that the Federal question upon which the jurisdiction depends, is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing—that is, the questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence, also, one of the motions cannot be allowed except upon a ground which also would

justify the allowance of the other. Under this state of the case (there being, of course, no inherently Federal questions, *Swafford* v. *Templeton*, 185 U. S. 487), we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is the motion to dismiss, and therefore, *the writ of error is dismissed.*"

The very recent case of *Gring* v. *Ives*, decided, during the present term of the court, is instructive. There the plaintiff in error, upon the theory that a Federal question was wrongly decided against him, sought the reversal of a $300 judgment for damages occasioned by the running of a tug boat, of which he was the owner, against a marine railway, the property of the defendant in error. The railway was situated on the shore of a river in the harbor of Elizabeth City, North Carolina. The Supreme Court of North Carolina affirmed the judgment of the trial court, and stated the grounds upon which its decision rested. The contention of the plaintiff in error was that there could be no recovery because of the establishment by the Secretary of War, some time between the year 1900 and the year 1902, of a harbor line under the authority of an act of Congress, and that inasmuch as the railway projected into the river beyond the established harbor line, it was illegal and a public nuisance.

Under this state of facts, Mr. Chief Justice White in holding that the writ of error should be dismissed said that the contention of the plaintiff in error was so clearly unfounded as not properly to serve as a basis for the writ, saying:

> "In view of the character of the case, the facts found by the court below and the absolute want of merit in the federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be dismissed for want of jurisdiction."

From the foregoing it is submitted that while it may not seem to the court proper to dismiss the case for want of jurisdiction, yet under the authority of the case of *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 26, the same should be dismissed, because from the analysis of the prior decisions, settled by the cases which have gone before,

the objections raised by the record against the judgment of the court below are so wholly without merit as not to require further argument, and therefore the motion to affirm should be sustained.

THIRD

The ordinance of the City of Richmond imposing a license tax upon the plaintiff in error is not void as in violation of the Fourteenth Amendment to the Constitution of the United States.

At the time of the granting of the writ of error in this case, namely, February 14, 1910, there was pending on the docket of this Honorable Court a case under the style of *Dorris Griffith* v. *State of Connecticut*, which involved substantially the same questions as those presented in the record in this case, in error to the Supreme Court of Errors of the State of Connecticut, reported in 83 Conn. 1, and 74 Atl. 1068. In that case the same counsel appeared for the plaintiff in error that now appears for the plaintiff in error here, and he urged substantially the same objections to the statute of the State of Connecticut as are here urged against an ordinance of the City of Richmond. This case was argued in this Honorable Court November 28, 1910, and decided December 12, 1910, and is reported in 218 U. S. 563-572.

The statute there complained of provides as follows:

> "Sec. 1. No person, firm or corporation, or any agent thereof, other than a national bank or trust company duly incorporated under the laws of this State, or a pawn-broker, as provided in chapter 235 of the Public Acts of 1905, shall, directly or indirectly loan money to any person and directly or indirectly charge, demand, accept, or make an agreement to receive therefor interest at a greater rate than 15 per centum per annum. The provisions of this section shall not apply to loans made to any national bank, or any bank or trust company duly incorporated under the laws of this State, or to any bona fide mortgage of real or personal property.

"Sec. 2. No person, firm or corporation, with intent to evade section 1 hereof, shall accept a note for a greater amount than that actually loaned."

From a statement of the case embodied in the opinion of the court, it will appear that the following contentions were made against the legality of the statute:

(1) "It is claimed by the plaintiff in error that the statute in question is an arbitrary, unjust and unreasonable selection, favoring a class; is detrimental to the public, stifles competition, and that no good reason exists for the granting of the privilege of loaning money at any rate of interest without taking a mortgage on real or personal property to the favored class, to the exclusion of all others.

* * * * * * * * *

(2) "It is not a police regulation; there is no care imposed or restriction in the loan of money by the favored few,—simply an arbitrary, unreasonable limitation upon all except those privileged under the statute.

* * * * * * * * *

(3) "The regulation of interest charges is undoubtedly the proper subject of State legislation, but, in the first place, this statute is not a regulation of interest charges. It is in effect a special statute permitting only certain favored individuals or corporations to do an act or conduct a business.

* * * * * * * * *

(4) "There is no fair reason for the law that would not require with equal force its extension to others it leaves untouched."

* * * * * * * * *

In answer to these contentions the present Chief Justice, delivering the opinion of the court, said:

"It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the juris-

diction of a State for the use of money loaned within the jurisdiction of the State is one within the police power of such State. The power to regulate existing, the details of the legislation and the exceptions proper to be made rest primarily within the discretion of the State legislature, and 'unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the State; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws. *Watson* v. *Maryland*, 218 U. S. 173, and cases cited. In the case at bar, the Supreme Court of Errors ruled that the statute was not repugnant to the Fourteenth Amendment following a prior ruling to that effect made in *State* v. *Hurlburt*, 82 Conn. 232, 72 Atl. 1079."

Further on in the opinion, the Chief Justice, speaking of section 1 of the statute, which excludes from its operation loans made by any national bank or "any bank or trust company duly incorporated under the laws of this State, or to any bona fide mortgage of real or personal property," complained of as an unjust discrimination against the business conducted by the plaintiff in error, which the Supreme Court of Connecticut held to be a proper discrimination for a classification, saying:

> "In the argument on behalf of the plaintiff in error, no attempt is made to meet the force of the foregoing statements of the court below; and, clearly, in the light of such declarations, it is impossible to conclude otherwise than that the classification complained of has a reasonable basis and that the exemption of national banks, etc., was not a mere arbitrary selection."

And in concluding the opinion of the court, overruling all of the contentions of the plaintiff in error, the learned Chief Justice uses this language:

> "The Supreme Court of Errors of Connecticut did not err in its judgment of affirmance. As, however, the particular classification here assailed has not been the subject of express

consideration in any prior decision of this court, and hence the power to make it cannot be said to have been so explicitly foreclosed as to cause contention on the subject to be obviously frivolous, the motion to dismiss cannot prevail. *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36, ante, 921, 30 Sup. Ct. Rep. 676. It is, however, manifest from the analysis which has been made of prior decisions, that applying the principles settled by the cases which have gone before, the contentions now advanced against the correctness of the judgment are so wholly without merit as not to require further argument. The motion to affirm must therefore prevail."

From this holding it necessarily follows, I think, that if the writ of error in this case had been granted subsequent to the determination of the case last cited it would have been dismissed for want of jurisdiction, but even though the motion to dismiss be overruled yet it was held that the holding of the court must be affirmed.

The chief reliance of the plaintiff in error here, not unlike the reliance in practically all of the cases of this nature, is the holding of this honorable court in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356. This case furnishes possibly the best illustration of the maxim that "hard cases made bad law." Concerning which phrase Mr. Bouvier says it describes a condition growing out of the necessity "to meet a case of hardship to a party not entirely consonant with the true principles of law." So the court, under the stress of the situation shown in the record made use of expressions, which taken apart from the circumstances surrounding the particular case, have been misconstrued and misapplied by many of the State courts, *though this Honorable Court, speaking through Mr. Justice Mathews, delivering the opinion of the court, took pains to guard against a misapprehension*, and though subsequently this court has several times called attention to the ground upon which *the Yick Wo* case rested, notably in the case of *Gundling* v. *Chicago*, 177 U. S. 183, 186, where Mr. Justice Peckham uses the following language:

"The case principally relied upon by the plaintiff in error is that of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, relating to the regulation of laundries in

the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, without reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese, and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of the neighboring property from fire, or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court."

* * * * * * * * *

"The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above-mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such appellant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor."

And Mr. Justice Mathews in delivering the opinion of the court in the *Yick Wo* case, at page 373, said:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

In the case under consideration in its practical application there was not one scintilla of evidence offered to show or even tending to show that any unjust discrimination was made against the class of private bankers to which the plaintiff in error was assigned. If the plaintiff in error knew of any such discrimination he not only failed to disclose it by evidence of the nature brought forward in the Yick Wo case, but he refused to testify in his own behalf and tell in what the alleged discrimination consisted.

In *German Alliance Co.* v. *Hale*, 219 U. S. 307, 318, in which the State of Alabama undertook to classify insurance companies and fix different rates of taxation upon the same, Mr. Justice Harlan, after laying down the basis on which must rest the contention that the statute violates the clause of the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws, says:

> "We are yet clearly of the opinion that the statute does not, within the meaning of the Constitution, deny the insurance company the equal protection of the laws. The statute applies only to associations or corporations that unite in fixing the rates of insurance to be charged by each con-

stituent member of the combination. Looking at the evil to be remedied, that was such a classification as the State could legally make. The Legislature naturally directed its enactment against insurance companies or corporations, which before or at the time of trial, were found to be members of an insurance tariff association that fixed rates. No principle or classification required it to include insurance associations that were free to act, in the matter of rates, upon the merits of each application for insurance, unaffected by any agreement or arrangement with other companies."

In the brief of counsel for the plaintiff in error the case of *City of Richmond* v. *Model Laundry Co.*, 111 Va. 758, is relied upon to justify the contention that the ordinance, by reason of its delegation of power to the Committee on Finance is capable of abuse. Surely this contention is without merit, for the Supreme Court of Appeals of Virginia, speaking through Harrison, Judge, has, in this case, expressly held to the contrary resting in part at least its conclusion on the ground that the delegation here made concerned the imposition of taxes. About this the court said:

"The power of taxation under our system of government rests with the legislative and not with the judicial department, and its province cannot be invaded by the courts. If the power is exercised in an unwise, unjust and oppressive manner to any particular class, the remedy, within constitutional bounds, is by an appeal, not to the courts, but to the justice and patriotism of the representatives of the people," citing the case of *Ould and Carrington* v. *Richmond*, *supra*, and other cases decided in that court which distinctly hold that the delegation of the power to establish the classification may legally be made to the Committee on Finance.

The cases in this court which establish this proposition are too numerous and well understood to require citation. Many of these are cited and commented upon in the case of *Liberman* v. *Van De Carr*, 199 U. S. 552, 563, Mr. Justice Day, in concluding an able opinion on the subject, saying:

"There is nothing in the record to show that the action against him was arbitrary or oppressive, and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the State, author-

izes the exercise of a legal discretion in the granting or withholding of permits to transact a business which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law. In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority, and approved by the highest court of the State."

In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, a clear distinction was drawn by Mr. Justice Harlan, delivering the opinion of the court, between cases which involve taxation and those that merely concern the regulation of different callings and businesses under the police power.

At pages 562-563 he says:

"A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. * * * It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protest particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary and plainly denies the equal protection of the laws to those against whom it discriminates.

"We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say, in this connnction, that the constitutional validity of the stat-

ute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing law."

The case of *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114, furnishes another application of the principle laid down in the last above cited case, and numerous cases are there cited by Mr. Justice Harlan, who also delivered the opinion of the court. At page 126, he says:

> "The statute makes no such distinction among such wholesale dealers as handle *the particular articles specified in section* 9. The State had the right to classify such dealers separately from those who sold by wholesale, other articles than those mentioned in that section. The statute puts the constituents *of each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the State to adopt the classification of which the oil company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in Delaware Railroad Tax, 18 Wall. 206, 231, that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." But we will not speculate as to the motives of the State, and will assume—the statute, neither upon its face nor by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution, or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that so

far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purpose of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that all wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupation of wholesale dealers in other articles cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the tax payer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its term, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it."

Substantially every one of the authorities cited in this brief under the last foregoing head are apposite here, should the court be of opinion that the writ of error ought not to be dismissed and determine to hear the case upon its merits, those authorities need not be repeated, but the attention of the court is invited to them as if they were repeated under this head.

It is, therefore, humbly insisted that the writ of error is without merit and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

H. R. POLLARD,
City Attorney.
For Defendant in Error.

February 27, 1912.

38.

No. [redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

F. S. Bradley, Trading as Bradley & Co.,
Plaintiff in Error,
against
City of Richmond,
Defendant in Error.

IN ERROR FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Brief of Plaintiff in Error on Motion of Defendant in Error to Dismiss or Affirm.

STATEMENT.

The defendant in error moves to affirm the judgment below or to dismiss the writ of error upon the ground that this court is without jurisdiction in that the question involved is settled by the decisions of this court and that the appeal to this court is therefore frivolous.

The plaintiff in error asserts that there is no decision of this court which forecloses this appeal; that upon the authority of this court, and upon principle, the judgments below cannot stand.

It is not disputed that the law is as expressed in the decisions of this court cited by the counsel for the defendant in error, but counsel for plaintiff in error affirms that they are not to be applied as contended for by the defendant in error. That the facts in the case at bar are wholly dissimilar to those cases; yet the principles stated in them when applied to the facts in this case require a reversal of the courts below.

The plaintiff in error maintains that the ordinance in question and the tax upon the plaintiff in error thereunder are clearly void as in violation of the 14th Amendment of the Constitution of the United States, for the ordinance grants the arbitrary power (as defined by this court) to the Finance Committee of the Council therein mentioned to tax plaintiff at its will; which ordinance made no classification of person or business or defined the classes to be taxed and left the arbitrary exercise of the power of classification and thus taxing with said Finance Committee, who did not make any classification, but selected plaintiff in error and a few others and taxed them as private bankers $800, although plaintiff's capital was but $1,000, while other bankers with capitals of $20,000 and $10,000 each and other sums in excess of plaintiff's capital were taxed $200 and less and some not taxed at all [Tr. pp. 26-27], an actual illustration of the arbitrary power given to the Finance Committee.

The ordinance will be found at page 43 and page 45 of the transcript.

As plaintiff's points, as well as defendant's, state the facts so far as necessary to bring them intelligently before the court, no further statement is made here.

POINTS.

I.

THE ORDINANCES AND THE TAX IMPOSED ON THE PLAINTIFF IN ERROR WERE VOID AS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS; AND THIS COURT HAS JURISDICTION.

The ordinance in question is dated December 18th, 1906, and is found on page 43 of the transcript. Section five thereof provides that

> "All persons desiring to prosecute in the city any business as auctioneers, * * * private bankers," * * *

and certain other businesses, fourteen in number,

> "shall pay a special license tax for the privilege of prosecuting such business."

And it further provides:

> "Such persons shall be divided *into thirteen classes,* and the tax to be paid by them shall be, *if of the first class,* $800; second, $600; third, $400; fourth, $300; fifth, $250; sixth, $200; seventh, $150; eighth, $100; ninth, $75.00; tenth, $50.00; eleventh, $30.00; twelfth, $20.00; thirteenth, $10.00."

Section 18 (page 46) provides that

> *"The Committee on Finance shall classify* all persons, firms or corporations prosecuting or proposing to prosecute any business assessed with a class tax."

Under and pursuant to these sections the plaintiff in error was taxed $800 as a private banker and was convicted and fined for not paying the same.

In this ordinance no persons or businesses are classed. It merely ordains that there shall be thirteen classes. What class an auctioneer or private banker or any of the persons mentioned are in is not specified, designated or defined; it prescribes no rule or regulation whereby any of the persons or their business may be classified or taxed as a class or under what circumstances or conditions any of the persons or businesses may be placed in any of the classes and required to pay either $800, the maximum amount, or $10.00, the minimum amount, of the tax.

The ordinance speaks of thirteen classes of license, charges or tax and nothing more. Whether each business shall constitute one or the other of these classes; whether a certain number of each business shall constitute one or the other of these classes, whether a particular number of businesses mentioned grouped together shall constitute one or the other class, or whether one business or person alone engaged therein shall constitute one or the other of these classes is not defined or limited.

The ordinance is in effect and substance as if it read that the persons prosecuting such business mentioned therein shall pay from $10 to $800 as a tax for prosecuting the same as the Committee on Finance shall see fit, which is what the Committee on Finance did in the case at bar in taxing the plaintiff in error $800.

The Finance Committee could discriminate as it pleased; it could tax a person as a banker $800 if he had

but a capital of $100; it could tax an auctioneer $800 if he had but a like amount of capital. If the banking or auctioneering business or any of the other businesses mentioned were prosecuted by a Chinaman or a negro, it could classify him in the first or thirteenth or any of the class of amounts, because he happened to be of such nationality or color. They could tax a banker any amount up to $800 because he happened to lend money on the security of furniture or salaries, or because he dealt in municipal or other bonds, or because he dealt with Chinamen or negroes, if such business was obnoxious to the commmittee. It could show favor or partiality to one or the other in the business mentioned, or either of them, or any person in either, regardless of any consideration of business or capital used therein, by putting him in any class. It could tax John Smith $800 because of his name and John Jones, who was in the same business, $20 because it liked his name.

In short, the business and persons mentioned in the ordinance were at the absolute mercy of the Finance Committee.

The testimony shows that this Finance Committee did just as it is claimed they could do under this ordinance. Exhibit No. I [Tr. p. 26] is a statement of the "Private Bankers' License and Capital of Private Bankers Assessed with *ad valorem* Tax by the City of Richmond," and it will be seen that the private banker, Thomas Branch, with a capital of $10,000, was taxed or charged for a license $100; that W. S. Hutzler & Co., with a like capital, were taxed or charged $30; another with a capital of $5,000, $75; the Richmond Loan, with a capital

of $5,000, was not taxed or charged for any license whatever, as likewise Thompson & Co., with $2000 capital; that John L. Williams, with a capital of $20,000, was charged or taxed for a license $200.

The plaintiff in error, with a capital of $1,000, was taxed or charged $800 for a license, as well as eight others with but a like capital; two others with a capital of $4500 and $1400 were charged or taxed $800 for a license; others are charged from between $20 to $200. So that some private bankers were not taxed at all for doing such business and others were taxed indiscriminately.

It also appears as a fact that the State of Virginia grades the private banker's license tax according to the amount of capital over $5,000 employed in the business, and below $5,000 they are taxed $50, and that the license of $800 in the particular ordinance as to plaintiff in error was to prohibit them from doing business. [Tr. pp. 32-33.]

Here we find an actual illustration of the ordinance and how and why the Committee on Finance classified the persons.

The power given to the Committee on Finance to tax and classify the persons or businesses mentioned, and the tax by it on the plaintiff in error was a naked and arbitrary power as to such persons so engaged, neither restrained nor guided, and offends the constitutional provisions above quoted.

Yick Ho v. Hopkins, 118 U. S. 356;
Gulf & C. R. R. v. Ellis, 165 U. S. 150;
Connolly v. Union & Co., 184 U. S. 540;
Bell Gap R. R. Co. v. Pa., 134 U. S. 232-237.

In the Yick Ho case, speaking of an ordinance as to the keeping of laundries which gave the power to the supervisor to grant or withhold a license to conduct such business, this court said:

> "We are unable to concur in that interpretation (of the California courts that the ordinance conferred discretionary power on the supervisors) of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem to be intended to confer, *not discretion to be exercised upon a consideration of the whole case, but a naked and arbitrary power to give or withhold consent not only to places, but to persons.* * * * *The power given to them is not confined to their discretion in the legal use of the term, but is granted at their will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*"

And in distinguishing ordinances construed in former cases, the court said:

> "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform.
>
> "It allows without restriction the use for such purposes of buildings of brick or stone, but as to wooden buildings * * * divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business nor the situation and nature of adaptation of the buildings themselves, but *merely by an arbitrary line on one side of which are those who are permitted to pursue their industry by the mere will and consent* of the supervisors, and on the other side, those from whom that consent is withheld at their mere will and pleasure."

In endeavoring to sustain this ordinance the defendant in error cites a line of decisions of this court holding that certain laws applying only to a certain class of the people or businesses as applicable to the facts and the ordinance in question.

The ordinance in the case herein did not provide for any classification of persons or businesses mentioned therein, but such classification was delegated to the Finance Committee.

The defendant in error cites cases where laws were before this court which affected classes of persons, but such laws applied to all of the people affected and there was no undefined arbitrary power granted or delegated to officials. In tax cases the law fixed the tax and the duty of officials was but ministerial to fix the amount.

In Kentucky Railroad Tax Cases (115 U. S. 321) *the law* under consideration fixed the tax on the value of the railroad; the duties of the Board of Equalization were defined; they could not exercise any arbitrary power. The law prescribed methods and means for ascertaining the value of the real estate of the railroads, which was held to be no discrimination against them.

In the case of McMillan v. Anderson (95 U. S. 37), cited in the above case, each business mentioned in the law was taxed a specific sum; the only question was the mode or manner of its collection.

> "The mode of assessing taxes in the state by federal government and by all governments is necessarily summary, that it may be speedy. *By summary is not meant arbitrary or unequal or illegal.*"

The case of Clark v. Titusville (184 U. S. 329) is clearly distinguished from the case at bar by the head note. This court holds that it was a tax

> "on the privilege of doing business regulated by the amount of sales."

The ordinance in the case cited taxed merchants doing a business of $60,000 or over, $100; those doing a business of $1,000, $5, and so on by a regular scale of amounts. In other words, the ordinance provided that merchants should be taxed *by the amount or value of their sales.* The decision in that case was that thus classifying the tax by the amount or value of the business was proper. It cites the case of Magoun v. Illinois Trust Co. (170 U. S. 283), where the inheritance tax was fixed by *the law on the amount of the legacy.*

In Grundling v. Chicago (177 U. S. 183) the ordinance fixed the sum of $100 for the license, the power to grant which was vested in the mayor of the city, and in distinguishing it from the Yick Ho case, *supra,* the court said:

> "The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because with reference to the subject upon which it touched, *it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent* as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected."

The case of Noble State Bank v. Haskell (219 U. S. 104) has no application. Under an act of the Legislature of Oklahoma banks were assessed *one per cent on*

average daily deposits, for the purpose of creating a depositors' guaranty trust. The law fixed the assessment and all banks were thus assessed, and it held that the state could regulate the business of banking.

In the Engel v. O'Malley case (209 U. S. 128) the statutes of New York prohibited individuals from receiving deposits of money for safekeeping, etc., unless they received a license; the statute required them to deposit $10,000 and give a bond to obtain such license, excepting, however, national banks and others and specifying certain other exceptions.

The statute fixed the terms and conditions and the fee on which the license should be issued and the comptroller who issued them had no arbitrary power.

In the Southwestern Oil Co. v. Texas the statute applied to all wholesalers in oil, etc., who *were required to pay a tax of 20% on their gross receipts,"* AND NO ARBITRARY power was vested in any person.

In the Brown-Forman case (217 U. S. 563) the statute fixed a tax of 1¼ cents on the wine gallon; no arbitrary power was granted to any person; but speaking of classification, Justice Lurton said:

> "The rule on this subject *is that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said amendment, but that in all cases it must appear that not only that a classification has been made, but that it is based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."*

On the other hand, in Gulf etc. v. Ellis (165 U. S. 150), a statute singling out railroads, requiring them to pay attorney's fees if defeated, was held to deny the equal

protection of the laws. Speaking of the law as dealing with a class, Justice Brewer said:

> "Yet it is equally true that such classification can not be made arbitrarily (p. 156); that the penalty was not on all corporations. Only railroads of all corporations are selected to bear the penalty. The rule of equality is ignored."

And he further says:

> *"But arbitrary selection can never be justified* by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

In Connolly v. Union Sewer Pipe Co. (184 U. S. at p. 561) this court condemned and held the Illinois statute void which enacted that any combination of certain businesses in restraint of trade was unlawful excepting, however, agricultural products or live stock in the hands of the producer or raiser; because of this exception and discrimination. Mr. Justice Harlan said, after quoting the statute:

> "The statute so provides, *notwithstanding persons engaged in trade or in the sale of merchandise and commodities within the limits of a state and agriculturists and raisers of live stock are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations applicable alike to all in like conditions as the state may legally prescribe.*"
>
> "The difficulty is *not met* by saying that, generally speaking, the state * * * may * * * make a *classification of persons,* firms, corporations and associations in order to subserve public objects. For this court has held *that classification must always rest upon some difference* which bears a reasonable and just relation to the act in respect to which classification is proposed, *and can never be made arbi-*

trary without any such basis. But arbitrary selection can never be justified by calling it classification."

The cases therein cited point out the distinction which has been made of the cases cited by the defendant in error.

And in a case similar to the last quoted (Cotting v. Kansas City Stock Yards Co., 183 U. S. 79) it was unanimously held that a statute regulating the charges of stock yards, but excepting certain of them from its operation was repugnant to the Fourteenth Amendment in that it denied equal protection of the laws.

Counsel for plaintiff and the court below have endeavored to assimilate laws made in reference to a class of people with an ordinance which grants arbitrary power of selection to tax to a committee or to the committee itself. It is tantamount to saying that because the committee selected the plaintiff in error to pay $800 he shall do so, regardless of the law. But, if it could be called a classification of private bankers, its exceptions and discriminations bring it within the rule of the Union Sewer Co. and Cotter cases.

It is also said that the plaintiff in error had the right to appeal to the council, but the same arguments apply in such event as applied to the committee. The ordinance in itself was arbitrary, fixed no basis of taxing, and the same arbitrary power was vested in the council as in the committee; the Council could do as it pleased, regardless of the law.

The learned counsel for the defendant in error after exhaustively treating of class legislation in order to sus-

tain the judgments below, cites a number of cases to the effect that this court will not decide questions of fact, but purely questions of law in the record and that they are pertinent because of

> "the vain attempt made in the evidence copied into the record to show that some unjust discrimination of private bankers was made as compared with the business of others similarly engaged."

There was no vain attempt to show this discrimination, it was a fact shown by the evidence to convict the plaintiff in error, and this evidence and fact was relied upon both by counsel for defendant in error and the court below to show that there was a legal classification and for the purpose of showing that the plaintiff in error was taxed.

The fact can not be rejected in determining the question of law any more than the fact that the plaintiff in error was taxed.

In the Yick Ho case the fact that licenses were issued to all others but Chinamen was a fact in the case which led to the determination of this court that the ordinance was void. That there was discrimination was a fact found and established by the record as well as the fact of the existence of the ordinance and the conviction of the plaintiff in error, and these facts bring up for review the questions of law involved.

The record shows that the plaintiff in error did not have the equal protection of the laws within the meaning of the decisions of this court interpreting the Fourteenth Amendment.

II.

THE MOTION HEREIN TO DISMISS OR AFFIRM SHOULD BE DENIED AND THE JUDGMENT OF THE LOWER COURT REVERSED.

Respectfully submitted.

I. HENRY HARRIS,

Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 516.

F. S. BRADLEY, TRADING AS BRADLEY & CO.,
PLAINTIFF IN ERROR,

vs.

CITY OF RICHMOND, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

MOTION TO DISMISS OR AFFIRM.

Comes the defendant in error and moves this Honorable Court to dismiss the said writ of error because this court has no jurisdiction, or to affirm the judgment complained of, it being manifest that even if this court has jurisdiction the said appeal was taken for delay only, and the questions on which jurisdiction depends are so frivolous as not to need further argument.

HENRY R. POLLARD, City Attorney,
For the Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1910.

F. S. BRADLEY, TRADING AS BRADLEY & CO., *Plaintiff in Error*,
vs.
CITY OF RICHMOND, *Defendant in Error.*

No. 516.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

NOTICE.

To I. HENRY HARRIS,
Attorney for Plaintiff in Error
in the Above Entitled Case:

You are hereby notified that the defendant in error in the above entitled case will on Monday, the 24th day of April, 1911, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motions to dismiss or affirm and the grounds of said motions, and the brief of the argument thereon, both of which are hereto attached.

HENRY R. POLLARD, City Attorney,
For the Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1910.

F. S. BRADLEY, TRADING AS BRADLEY & CO., *Plaintiff in Error*,
vs.
CITY OF RICHMOND, *Defendant in Error.*

No. 516.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

AFFIDAVIT OF SERVICE.

Before me, James P. Brady, clerk of the Circuit Court of the United States for the Eastern District of Virginia, at my office at Richmond, in said district, this day personally appeared Richmond T. Lacy, Jr., who, being by me duly sworn, deposes and says that on this day he deposited in the United States mail in the City of Richmond, with postage prepaid, true copies of the attached motions, notice and brief of argument of the defendant in error, addressed to I Henry Harris, counsel of record of the above named plaintiff in error.

RICHMOND T. LACY, JR.

Sworn to and subscribed before me this, the 15th day of March, 1911.

JOSEPH P. BRADY, *Clerk.*

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1910.

No. 516.

F. S. BRADLEY, TRADING AS BRADLEY & CO.,
PLAINTIFF IN ERROR.

vs.

CITY OF RICHMOND, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

GROUNDS OF MOTION TO DISMISS OR AFFIRM WRIT OF ERROR, AND BRIEF FOR DEFENDANT IN ERROR ON SAID MOTIONS.

STATEMENT OF CASE.

This writ of error is taken in a prosecution by the City of Richmond, Virginia, brought in August, 1907, before the Police Justice of the said city, charging that the plaintiff in error had violated an ordinance of the City of Richmond by failing to pay the city class tax assessed against him, in which prosecution judgment was rendered against him for the

sum of $25.00 and costs (Transcript of Record, p. 12), from which judgment, an appeal was taken to the Hustings Court of the City of Richmond, where the said judgment of the Police Justice was affirmed, and the defendant in error recovered against the said plaintiff in error the said fine of $25.00 and the costs of the prosecution (Transcript of Record, p. 13), from which judgment in the said Hustings Court, a writ of error and supersedeas was awarded by the Supreme Court of Appeals of Virginia, and upon the hearing of the said writ of error and supersedeas in the said Supreme Court of Appeals of Virginia, on January 13, 1910, the judgment of the said Hustings Court was affirmed (Transcript of Record, p. 50). See 110 Va. p. 521, and 66 S. E. p. 872. From this judgment a writ of error and supersedeas was allowed to this Honorable Court on the 14th day of February, 1910 (Transcript of Record, pp. 51-7).

The grounds assigned in the Supreme Court of Appeals of Virginia are numerous (Transcript of Record, p. 3-9), but inasmuch as all but one of these relate either to the procedure in the court below, or to the construction of certain State statutes and ordinances, this Honorable Court is not concerned therewith. The one with which this court is concerned is stated in thefollowing language:

> "F. The said ordinance and the said assessment are in violation of the Constitution of Virginia guaranteeing due process of law, *and also in violation of the Fourteenth Amendment of the Constitution of the United States guaranteeing due process of law and the equal protection of the laws and other protections mentioned therein*" (Transcript of Record, p. 9).

The provision of the charter of the City of Richmond pertinent to the question at issue is in the following language:

> "69. For the execution of its powers and duties, the City Council may raise, annually, by taxes and as-

> assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and the United States." * * *

And section 70 of said charter is in the following language:

> "70. The City Council may grant or refuse licenses, and may require taxes to be paid on such licenses, to agents of insurance companies whose principal office is not located in said city; to auctioneers; to public, theatrical or other performances or shows; to keepers of billiard tables, ten-pin alleys and pistol galleries; to hawkers and peddlers in the city, or persons to sell goods by sample therein; to agents for the sale or renting of real estate; to commission merchants, and all other business which cannot be reached by the *ad valorem* system under the preceding section."

The ordinances of the City of Richmond, passed in pursuance of these charter provisions, are as follows:

> "5. All persons desiring to prosecute in the city any business as auctioneers, agents for the sale or renting of real estate, sub-agents for the sale or renting of real estate, commission merchants, traders, brokers, keepers of ordinaries, houses of private entertainment, eating houses or cook shops, city scavengers, surveyors, title examiners (other than licensed attorneys), advertising agents, bill posters and distributors, or any other business which cannot be reached by the *ad valorem* system, shall pay a special license tax for the privilege of prosecuting such business. Such persons shall be divided into thirteen classes and the tax to be paid by them shall be: If in the first class, eight hundred dollars; second, six hundred dollars; third, four hundred dollars; fourth, three hundred dollars;

fifth, two hundred and fifty dollars; sixth, two hundred dollars; seventh, one hundred and fifty dollars; eighth, one hundred dollars; ninth, seventy-five dollars; tenth, fifty dollars; eleventh, thirty dollars; twelfth, twenty dollars; thirteenth, ten dollars. But the special license tax so imposed shall not exempt any such business from the usual tax on capital employed in said business." (Transcript of Record, p. 45.)

* * * * * *

"18. The Committee on Finance shall classify all persons, firms or corporations prosecuting, or proposing to prosecute any business assessed with a class tax; in performing which duty they may require the attendance and advice of the Commissioner of the Revenue, the City Collector, or any city officer. They shall return such classification to the Auditor on or before the 15th day of March. He shall promptly give notice, by due advertisement, in two or more of the city newspapers, that such classification is lying in his office, open to public inspection, and that at times and places therein to be specified within the next ensuing ten days, the committee will meet to hear all persons, firms or corporations complaining of the license assessed against them. After such modifications as the committee may direct, a copy of such classification shall be immediately furnished to the Commissioner of the Revenue, who shall at once prepare two full and complete copies of all licenses assessed, one copy of which he shall deliver to the Auditor and one copy to the City Collector. No change in such classification shall afterwards be made, except upon the order of the City Council. Any person aggrieved by the action of the committee may appeal to the City Council at its next regular meeting; but thereafter no application for any change shall be entertained, except upon the recommendation of the Committee on Finance." (Transcript of Record, p. 46.)

* * * * * *

"29. The Collector shall, upon the first day of April, proceed to collect all license taxes not previ-

ously paid; and any person liable to such taxes who shall prosecute his business after the first day of May without having paid such taxes, shall be liable to a fine of not less than $1, nor more than $5, for every day of default. The offender, on failing to pay the fine imposed, may be imprisoned in the city jail for a term of not less than five nor more than thirty days. Whenever any fine is so imposed, but not paid, the Police Justice, if he shall not order the party to be imprisoned in the city jail, may, unless an appeal be taken forthwith, issue a writ of *fieri facias* for said fine, directed to the Sergeant of the city. Such writ must be made returnable to the said Police Justice within sixty days from its issuance. The Collector shall, on or before the first day of June, report to the Police Justice a list of all persons liable to such taxes and in default." (Transcript of Record, pp. 46-47.)

Authority for the imposition of fines for the violation of ordinances is contained in section 20 of the Charter of the City of Richmond, where it is provided as follows:

"20. Where, by the provisions of this act, the City Council has authority to pass ordinances on any subject, they may prescribe any fine or penalty, not exceeding five hundred dollars (except where a fine or penalty is herein otherwise provided for), for a violation thereof, and may provide that the offender, on failing to pay the fine or penalty imposed, shall be imprisoned in the jail of the said city for any term not exceeding three calendar months. Such imprisonment may be ordered to be with or without labor; when ordered to be with labor the Council may by ordinance declare what kind of labor shall be done for the city by such offenders, either at said jail or elsewhere in the said city. And the City Council may subject the parent or guardian of any minor, or the master or mistress of any apprentice, to any such fine for any such offense committed by such minor or apprentice. From any fine or imprisonment imposed

an appeal lies to the Hustings Court of the city as in cases of misdemeanor."

And by reference to section 4106 of the Code of Virginia, 1887, as amended by an act approved March 11, 1904, (Acts 1904, p. 158), and section 4107 of the Code of Virginia 1887, as amended by the act approved December 10, 1903, (Acts 1902-3-4, p. 616), it will be seen that a person convicted of a misdemeanor before a justice of the peace has a peremptory right of appeal from such judgment to the Hustings or Corporation Court of the city, and to the Circuit Court of any county in which such conviction is had; and by section 4108 of the Code of Virginia 1887, it is provided in reference to such appeal, as follows:

> "The appeal shall be tried without formal pleadings in writing, and the accused shall be entitled to a trial by a jury in the same manner as if he had been indicted for the offence in the said court."

The record in this case shows that the trial by jury thus guaranteed to every defendant was expressly waived by the plaintiff in error, and by consent of parties "the whole matter of law and of fact is (was) submitted to the judgment and decision of the court." (Transcript of Record, p. 13.)

Upon the trial of the case, both in the Police Court and in the Hustings Court of the City of Richmond, it was not denied, but admitted, that the plaintiff in error, under the firm name of Bradley & Co. (Transcript of Record, p. 19), had been regularly assessed with a license class tax of $800, for transacting business in the City of Richmond as a private banker, and that he had proceeded since such classification and assessment to prosecute his business without having procured a license so to do, his sole contention in the premises being that the ordinances of the city and the action of the Committee on Finance of the City Council of the City of Rich-

mond in making the classification was illegal and void, for the reasons set forth in his petition for an appeal from the judgment of the Hustings Court. It was also not denied, but admitted, that the plaintiff in error, though he knew of the action of the Committee on Finance in making the assessment against him, yet had not availed himself of the provisions contained in section 18 of the city ordinances hereinbefore quoted, which authorized any person aggrieved by the action of said committee to appeal to the City Council, at its next regular meeting, for redress against an erroneous or excessive assessment or classification.

All of the questions arising under this situation of the record were submitted to and passed upon by the Supreme Court of Appeals of Virginia adversely to the contention of the plaintiff in error, yet but one of them, under decisions of this court too numerous and familiar to be cited, remain open for consideration and review, viz.: That the ordinances under which the assessment of the class tax was made were in violation of the Fourteenth Amendment of the Constitution of the United States.

GROUNDS OF MOTION TO DISMISS.

First—This Honorable Court is without jurisdiction.

It is a well established principle that where the soundness of a federal question so clearly appears from previous decisions as to foreclose the subject and leave no room for controversy, a writ of error awarded from a court of last resort of a State to this Honorable Court will be dismissed for want of jurisdiction. *Hannis-Distilling Co.* v. *Mayor and City Council of Baltimore*, 216 U. S. 285, 288.

In that case, as in this, the writ of error was directly from the court of last resort of the State, and was prosecuted upon the assumption that questions under the Constitution of the United States were involved, which gave a right to an im-

mediate resort to this Honorable Court for solution, and the court, speaking through Mr. Justice White, said:

> "Upon the correctness of this assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Citing *Leonard* v. *Vicksburg, etc., Co.*, 198 U. S. 416, 421, and cases cited; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324, 335; *McGilvra* v. *Ross*, 215 U. S. 70.

An examination of the assignments of error relied on here, found in the Transcript of the Record, pages 52, 53, will show that they are substantially the same, though stated under ten heads, and are only a reiteration in different language of the charge that the ordinance of the city which provided that the classification of persons engaged in the business of private bankers was violative of the Fourteenth Amendment of the Constitution of the United States, in that the said ordinance, "unequally and unjustly, and arbitrarily, unreasonably and unjustly fixes thirteen classes who shall pay different and unequal taxes, and fails to enact what persons or business shall constitute each class, or under what conditions or circumstances each class shall pay the different sums mentioned in said ordinance."

It is undoubtedly true that similar provisions in State statutes imposing taxes and in ordinances of municipalities imposing municipal taxes have been repeatedly under review in this Honorable Court on substantially the same charge of unconstitutionality as that preferred and urged here and now.

In the Kentucky Railroad Cases, 115 U. S. 321, it was

established that where a State statute for raising public revenue gives notice of the proposed assessment to an owner of property to be affected, by requiring him at a time named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes the time and place at which this statement and estimate are to be considered, and when and where the party interested has the right to be present and to be heard; and which affords him opportunity to test the validity of the proceeding, does not deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States; and likewise held that such a law for the valuation of property and for the assessment of taxes thereon which provides for the *classification* of property subject to its provisions into different classes; which makes for one class one set of provisions as to modes and methods of ascertainment of value and as to the right of appeal, and different provisions for another class as to those subjects, so that the law shall operate equally and uniformly, denies to no person affected by it "equal protection of the laws" within the meaning of the Fourteenth Amendment of the Constitution of the United States.

This is a leading case on the subject of the right of a State or municipality to make a classification of persons and subjects of taxation, and the principles laid down therein have never been departed from.

More directly in point, however, is the case of *Clark* v. *City of Titusville*, 184 U. S. 329, where it was held that an ordinance imposing a license tax upon merchants in the city, which divides them into classes according to the amount of their sales, does not violate the equality clause of the Fourteenth Amendment of the Constitution of the United States, although the result is to make persons in different classes pay

different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ.

In *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 296, it is said:

> "There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. * * * And if the constituents of each class are affected alike, the rule of equality prescribed by the cases, is satisfied. In other words the law operates equally and uniformly upon all persons in similar circumstances."

Mr. Justice McKenna, closing the opinion of the court in the case, says:

> "All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed, and their illegality has never been questioned. We think the classification of the Illinois law was in the power of the Legislature to make, and the decree of the Circuit Court is affirmed."

In *Gundling* v. *Chicago*, 177 U. S. 183, 185, it was said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance, because of the alleged arbitrary power of the Mayor to grant or refuse it. He made no application for a license, and of course the Mayor had not refused it, *non constat* that he would have refused it, if application had been made by the plaintiff in error. * * *
>
> "But, assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard

to the clause requiring due process of law or in that providing for the equal protection of the laws." * * *

At page 188, the court further says:

> "Regulations respecting the pursuit of a lawful trade or business are very frequent occurrences in the various statutes of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose, that the property and personal rights of citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass and they form no subject for federal interference."

In the case it was distinctly settled that it is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance, which authorized it, fulfils the two functions, one a regulating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

These deliverances of the court in this important case will become more pertinent to this discussion when the cases of *Noble State Bank* v. *Haskell* and *Engel* v. *O'Malley* (decided at the present term of the court) are examined.

So far from the plaintiff in error showing by the record

that he sought redress against an erroneous assessment by making to the City Council objection to the assessment which the ordinance clearly gave him the right to do, it is shown that he did not make such application and failed to pursue the relief offered and proceeded to do business in violation of the ordinance, and determined to rely upon making a defense to the criminal prosecution for conducting his business in violation of the ordinance. As is said in the last above quoted case, *non constat* had he appealed to the City Council, as was his absolute right, he would not have had his grievances redressed. This remedy he contumaciously rejected, and having done so claims that he was denied due process of law under a system of taxation approved by the highest tribunal of the State as far back as 1873. See *Ould and Carrington* v. *City of Richmond*, 23 Gratt. 464, approved by a continuous line of cases, from that time to the present time, too numerous to be cited, a list of which will be found in the case of *Norfolk & Western Ry. Co.* v. *Town of Suffolk*, 103 Va. 498, 499, 500.

In *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, Mr. Justice Harlan quotes with approval from the case of *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, the following language:

> "The provision of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it choose, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products."

Concluding the opinion of the court, Mr. Justice Harlan, says:

"It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that all wholesale dealers in specified articles shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, in the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the tax-payer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal Court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the State to enact it."

In the case of *Brown-Forman* v. *Kentucky*, 217 U. S. 563, 573, it was held that a license or occupation tax imposed upon the business of compounding, rectifying, etc., distilled spirits is not invalid as denying the equal protection of the laws, because no such tax is exacted from either resident or non-resident distillers who neither rectify, compound, etc., their products, nor from rectifiers and blenders of other States and countries who vend in the State untaxed rectified or blended spirits, in direct competition with the spirits of local rectifiers or blenders; the court, speaking through Mr. Justice Lurton, saying:

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax."

In *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 354, the court said, speaking through Mr. Justice McKenna:

"We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But logical approximateness of the exclusion or inclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238. And this necessarily on account of the complex problems which are presented to the government. Evils must be met as they arise, and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of State laws redressed by it."

The power to classify private bankers and assess each class alike was constitutionally and legally conferred upon the Committee on Finance of the Council of the City of Richmond, as determined by the case of Ould and Carrington, *supra*, and like cases following it to the present case; hence the legality of that delegation of power is not open for consideration in this court.

In *Noble State Bank* v. *Haskell*, 219 U. S. ———, decided at the present term of the court, it was distinctly held that the police power of a State extends to the regulation of the

banking business, and even to its prohibition, except on such conditions as the State may prescribe.

So likewise in *Engel* v. *O'Malley*, 219 U. S. ———, also decided at the present term of the court, it was held that the business of receiving deposits of money in small sums from time to time, until they reach an amount sufficient to be sent to other States or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the State. The statute in the last mentioned case required that a license from the comptroller be obtained by persons desiring to engage in the business of receiving deposits of money for safe keeping, or for the purpose of transmitting to another, or for any other purpose, and the court held that the possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim does not invalidate, under the Fourteenth Amendment of the Constitution, the requirement of the statute that before the business is engaged in a license shall be obtained, and although the statute provided that it should not apply to private bankers whose business is such that the average amount of each sum received is not less than $500, that this constituted no unjust discrimination. Mr. Justice Holmes, delivering the opinion of the court in the case, saying:

> "The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will, as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. * * * Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert. This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment,

the State could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force."

Among those mentioned by the learned Justice was that the comptroller might refuse licenses upon an arbitrary whim, no guides being given him for his discretion. This objection was disposed in the following language:

> "But the nature and extent of the remedy, if any, for a breach of duty on his part, we think, is unnecessary to consider; for the power of the State to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached." Citing the case of *New York* v. *Van de Carr*, 199 U. S. 552, 563.

Another pertinent case decided at the present term of the court is *Broadnax* v. *State of Missouri*, where Mr. Justice Harlan, delivering the opinion of the court, said:

> "Of course we take the statute as a local law to mean what the court says it means. Nor is there any force in the objection that the classification, as shown by the statute, is arbitrary and unreasonable. The same methods and means are applied equally to all of the same class."

In this connection it only remains to be pointed out that the Supreme Court of Appeals of Virginia, speaking by Harrison, J., in deciding the case in that tribunal, said:

> "The record shows that the plaintiff in error and ten (10) other private bankers were put in the first class and each assessed with a license tax of $800. Such license taxes are not contrary to the provision requiring equality and uniformity, if all in the same

class are required to pay the same tax." Citing *Ould, etc.* v. *Richmond*, 23 Gratt., 464; *Commonwealth* v. *Moore*, 25 Gratt. 951; *Norfolk* v. *Norfolk Landmark*, 95 Va. 564; *Morgan's Case*, 98 Va. 815; *Newport News, etc.* v. *Newport News*, 100 Va. 161; and *Norfolk* v. *Griffith-Powell* Co., 102 Va. 115. The court adding: "That the power of taxation under our system of government rests with the Legislature and not with the judicial department, and its provisions cannot be invalidated by the courts. Where the power to tax for revenue purposes exists the amount of the tax is in the discretion of the Legislative body, and it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of such State or corporation may prescribe. If the power is exercised in an unwise, unjust and oppressive manner to any particular class, the remedy within constitutional bounds is by appeal not to the courts, but to the justice and patriotism of the representatives of the people."

And further on, speaking of the alleged injustice of the classification made by the Committee on Finance, said:

"It was competent for the Council to assign private bankers to different classes, and the plaintiff in error was required to pay no greater license tax than all others in the same class with himself. In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which he alleges to be favored. *Norfolk, etc.* v. *Norfolk*, 105 Va. 139. This has not been shown in the present case; on the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax." (See Transcript of Record, p. 48-49; 110 Va. 521, 524.)

Defendant in error humbly submits that this decision and these deliverances of the Supreme Court of Appeals of Virginia, read in connection with the line of cases herein last above cited from this Honorable Court, show that the present case is substantially on all fours with the case of *Hannis-Distilling Co.* v. *Baltimore*, *supra*, where the writ of error was dismissed, on the ground that the court was without jurisdiction, inasmuch as the question on which it rested was "manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy," the court further saying:

> "Beyond the dispute in the *Carstairs* case, the court of last resort of Maryland upheld the act here in controversy as an exertion of the taxing power of the State, and in so doing declared that it but reiterated and re-expounded rulings by it previously made. It follows that as for the purposes of the review by this court of alleged questions concerning the repugnancy of the taxing act to the Constitution of the United States the decisions of the State court maintaining under the State Constitution the validity of the taxing power which the act exerted was binding upon this court; it must result that the contentions to the contrary are so devoid of merit as to present no Federal question."

The analogy between the situation there and here is so patent as to need no elucidation.

Second:—Although the record may show that this Honorable Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument.

In the recent case of *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 36, 49, the line of demarcation between the principles controlling the court in the determination of the motion to dismiss for want of jurisdiction, and to dismiss on the ground stated under this head, was clearly stated, possibly more so than ever before, Mr. Justice White saying:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that a Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and, therefore, not adequate to confer jurisdiction. The contention may not prevail, even though it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous."

The converse of the proposition thus stated must be true, viz.: that where it appears that the appeal was taken for delay, or that, though the expounding and analyzing of familiar decisions be necessary, yet where that shows the practical unanimity of the decisions upon the issue presented, the court will affirm the judgment of the court below as plainly right.

1. *The record discloses the fact that the writ of error was resorted to for delay only.*

The judgment now complained of was rendered in the Police Court of the City of Richmond on August 8, 1907, and from that judgment appeal was taken to the Hustings Court of the City of Richmond, where the trial took place in Octo-

ber, 1906. There the judgment of the Police Court was affirmed and from which affirmance a writ of error and supersedeas was allowed to the Supreme Court of Appeals of Virginia on December 3, 1908, where on January 10, 1910, the judgment of the Hustings Court was affirmed, from which judgment the plaintiff in error obtained a writ of error and supersedeas to this Honorable Court on January 28, 1910, where the record was filed April 22, 1910. (See Transcript of Record, pp. 12, 13, 11, 50, 51, 52 and 58.)

After the filing of the record in the clerk's office of this Honorable Court, no action was taken by the plaintiff in error to have the record printed, hence it became necessary for the defendant in error to have it printed, so that this motion might be submitted.

It thus appears that the defendant in error has been unable to enforce the payment of the license tax of $800, due it for the year 1907, to which presumably must be added like assessments for the years 1908, 1909, 1910 and 1911, by reason of defenses set up by the plaintiff in error and brought to the attention successively of four different tribunals having jurisdiction in the premises. This fact, taken in connection with the fact that the record discloses that eight other private bankers, assessed with like license taxes, are making the same defenses and relying upon the result of this controversy, and, in the meantime, what the legislative branch of the government conceived to be a proper regulation of a certain class of private bankers, as well as the collection of a substantial revenue, from said licenses, is suspended, while the plaintiff in error brings under review constitutional questions determined adversely to his contention by the Supreme Court of Appeals of Virginia, more than a third of a century before. Such conduct negatives the presumption of "good faith," which is held to be an important, if not an essential, element in the presentation of a constitutional question for a second time.

Western Union Tel. Co. v. *Reynolds*, et als, 100 Va. 459, 467-8. Hence the judgment of the court below should be affirmed.

2. *It is manifest from an analysis of the prior decisions in this and kindred cases, that, applying the principles settled by the cases which have gone before, the contentions now advanced are wholly without merit and therefore do not require further argument.*

The attention of the court is specially called to the opinion of the Supreme Court of Appeals of Virginia in the case under argument, found at pages 47-50 of the Transcript of the Record. By a comparison of this opinion with the opinion of the same court in the case of *Ould and Carrington* v. *City of Richmond*, 23 Gratt. 464, it will be seen that the questions presented in the present case were identical with those presented in the *Ould and Carrington case*.

In the case of *N. & W. R. R. Co.* v. *Goddin*, 94 Va. 513, 515, it was said:

> "At the time the writ of error in the case before us was awarded, the constitutionality of section 1292 had been twice passed upon in this court, and it was no longer a debatable question. The test of 'good faith' does not fully meet the difficulty. Counsel and parties may, with perfect good faith, ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? See 2 Enc. of Plead. and Pr., p. 40-41; *Virden* v. *Allen*, 107 Ill. 505; *Chaplin* v. *Highway Commissioners*, 126 Ill. 264. Applying this test, it is plain that the constitutionality of section

1292 is not an open one in this court. It is no longer 'debatable.'"

No State court of last resort in this country has been more pronounced, than has been the Supreme Court of Appeals, in enforcing the maxim, *interest republicae ut sit finis litium*, and consequently upon the principles stated in the foregoing quotation, that court would have dismissed the writ of error in this case, when it was before it, from the Hustings Court, but for the Federal question in the record, and it is fair to presume that, inasmuch as the record presented to them indicated clearly the purpose of the plaintiff in error to raise and to have determined a Federal question, not only by that court, but by this, it was important that the court here should fully see the views of the court below as to the merits of the controversy, as well as its construction of the ordinance, the legality of which was challenged as in conflict with the Federal Constitution. As hereinbefore pointed out, the Supreme Court of Appeals has consistently and continuously adhered to the principles settled in the *Ould and Carrington case*, saying in this case:

> "Chapter 13, sec. 15 of the City Code provides, that the Finance Committee, after making the classification, shall return the same to the Auditor on or before the first day of April, who is required promptly to give notice by due advertisement in two or more papers that such classification is lying in his office open to inspection, and that at times and places therein to be specified the committee will meet to hear all persons complaining of the assignment made of themselves, but further providing the right of appeal to all persons feeling themselves aggrieved by the action of the committee to the Council of the City of Richmond. This remedy has been held to give the party aggrieved sufficient opportunity to be heard, and the plaintiff in error has availed himself of it. *Ould and Carrington* v. *City of Richmond*, *supra*.

See also *King* v. *Portland*, 184 U. S. 61; *Telephone, etc., Co.* v. *Los Angeles*, 211 U. S. 265." (Transcript of Record, p. 50; 110 Va. 521, 526.)

Nor has this Honorable Court been less persistent in recognizing and enforcing the salutary maxim above quoted, under conditions like those presented here.

In *Wright* v. *Sills*, 2 Black 544, 545, it was said:

> "Whatever difference of opinion may have existed in this court heretofore in regard to these questions, or may now exist, if they were opened for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhaustive in the earlier cases. It can subserve no useful purpose again to examine the subject. The decree of the court below is affirmed."

And, again in *Minnesota, etc., Co.* v. *National, etc., Co.*, 3 Wall. 332, 334, it was said by Mr. Justice Grier:

> "Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgments."

The court below on the Federal question cited the two following cases from this court, as sustaining its decision, namely, *King* v. *Portland*, 184 U. S. 64, 70, where it was held that a party cannot be heard to complain that his property had been taken without due process of law, where, by the decisions of the court of last resort of a State, he has the right of injunction against the collection of illegal taxes, though no opportunity to be heard is given in the statute levying the taxes; and the case of *Telephone, etc., Co.* v. *Los Angeles*, 211 U. S. p. 265, 281, where this Honorable Court, speaking through Mr. Justice Moody, approved a deliverance

made in the case of *Sweet* v. *Rechel*, 159 U. S. 380, 392, where it was said:

> "But, in determining whether the Legislature, in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative autnority, the existence of the circumstances necessary to support it must be presumed."

Mr. Justice Moody adding:

> "It is to be taken into account in considering this, as well as other questions, that the applicant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly, and that there is no suggestion in the case at bar, that the rates actually fixed were so low as to operate as a practical confiscation of property."

To these two decisions, relied on by the court below, many others might have been added, among them the case of *Illinois Central R. Co.* v. *Commonwealth of Kentucky*, 218 U. S. 551, 561, which is pertinent. In this case the court quotes with approval from the opinion of the Court of Appeals of Kentucky, where it was said:

> "A final assessment had been had, as provided by law, and if any injustice was done the tax-payer, it was due entirely to his failure to appear before the board and ask a reduction of the assessment. No reliance could be placed in such proceedings, if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of

their actions depends upon what they do, and not upon their undisclosed purposes."

Concerning which this Honorable Court uses the following language:

> "This construction of the powers of the State officers under the statutes of the State relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the State; it was, under that law, a final assessment, and no ground is shown here for impugning it."

The pertinency of this authority will become more apparent when the court considers the vain attempt made in the evidence copied into the record to show that some unjust discrimination in the making of the classification of private bankers, as regards their business, compared with the business of others similarly engaged.

To such contention it is sufficient to answer, as was done, where a like contention was made in the case of *King* v. *W. Va.*, 216 U. S. 92, 100:

> "It is hardly necessary to add that on a writ of error we do not deal with the facts." Citing *Behn* v. *Campbell*, 205 U. S., p. 403.

In the case of *Iowa* v. *Rood*, 187 U. S. 87, 92, it was said:

> "The mere fact that the plaintiff in error asserts title under a Clause of the Constitution or an Act of Congress is not, in itself, sufficient unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color of such assertion, and if that were alone sufficient to give this court jurisdiction, a vast num-

ber of things might be brought here simply for delay or speculative advantage." Citing *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336.

The case of *Equitable Life Asso. of U. S.* v. *Brown*, 187 U. S. 308, 314, is one of interest as determining the practice which should prevail on the motions here submitted under the surrounding circumstances. It was there said:

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of facts upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so the case is brought directly within the rule announced in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited. It is likewise also apparent from analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, 132 U. S., 210; *Richardson* v. *Louisville & N. R. Co.*, 169 U. S. 128; and *Blyth* v. *Hinckley*, 180 U. S. 388. This being the case it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect to finally dispose of this controversy. The question

then is: To which of the motions should the decree which we are to render respond? As this is a case governed by the principles controlling writs of error to State courts, it follows that the Federal question upon which the jurisdiction depends, is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing—that is, the questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence, also, one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other. Under this state of the case (there being, of course, no inherently Federal question, *Swafford* v. *Templeton*, 185 U. S. 487), we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is the motion to dismiss, and therefore, *the writ of error is dismissed.*"

In conclusion it is submitted that the recent case of *Griffith* v. *Connecticut*, 218 U. S. 563, is absolutely conclusive of the soundness of the contention that the writ of error should be dismissed on the ground last stated. That case originated in one of the inferior courts of the State of Connecticut, and the offences charged were the exacting on certain loans of money, a rate of interest greater than fifteen per centum per annum, contrary to the statute of that State on the subject. During the course of the trial the companies assailed the validity of the statute referred to because of its alleged repugnancy to the contract Clause of the Constitution of the United States and to the equal protection Clause of the Fourteenth Amendment. The defendants were convicted and appealed to the highest court of the State of Connecticut, where the judgment of conviction was affirmed (83 Conn. 1; S. C. 74 Atl. 1068).

It probably is more than a mere coincidence that the same counsel appeared for the plaintiff in error in that case, as appeared for the plaintiff in error in this case. From the decision of the Connecticut court a writ of error was obtained to this court, and here a motion was made to dismiss or affirm, upon the same grounds as are now here assigned, and this Honorable Court, while overruling the motion to dismiss for want of jurisdiction, under the authority of the case of *L. & N. R. Co.* v. *Melton*, 218 U. S. 36, held that upon an analysis of the prior decisions, settled by cases which had gone before, the objections raised by the record against the judgment of the court below, were so wholly without merit, as not to require further argument, and therefore the motion to affirm was sustained.

When the provisions of the Connecticut statute are examined there can be no reasonable doubt but that the plaintiff in error in said case belonged to a class of money lenders doing a similar business in the City of Richmond, known as private bankers. The act referred to and quoted in the opinion of Mr. Justice White, provides as follows:

> "No person, firm or corporation or any agent thereof other than a national bank, or a bank or trust company, incorporated under the laws of this State, or a pawnbroker, as provided by chapter 235 of the Public Acts, 1905, shall directly or indirectly lend money to any person, and directly or indirectly charge, demand, accept or make any agreement to receive therefor interest at a greater rate than fifteen per centum per annum. The provisions of this section shall not apply to loans made by any national bank, or any bank or trust company duly incorporated under the laws of this State, or any *bona fide* mortgage on real or personal property."

While the particular statute had never before been under review in this court, yet, looking at the opinion of the Connecticut court, it was said:

"In the argument on behalf of the plaintiff in error, no attempt is made to meet the force of the foregoing statements of the court below; and, clearly, in the light of such declarations, it is impossible to conclude otherwise than that the classification complained of has a reasonable basis, and that the exemption of national banks, etc., was not a mere arbitrary selection.

"The Supreme Court of Errors of Connecticut did not err in its judgment of affirmanence. As, however, the particular classification here assailed has not been the subject of express consideration in any prior decision of this court, and hence the power to make it cannot be said to have been so explicitly foreclosed as to cause contention on the subject to be obviously frivolous, the motion to dismiss cannot prevail. *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36. It is, however, manifest from the analysis which has been made of prior decisions, that applying the principles settled by the cases which have gone before the contentions now advanced against the correctness of the judgment are so wholly without merit as not to require further argument. The motion to affirm must therefore prevail."

It is, therefore, submitted that in the case at bar, though the motion to dismiss the writ of error for want of jurisdiction be overruled, yet the motion to affirm must prevail.

Respectfully submitted,

HENRY R. POLLARD,
City Attorney,
For Defendant in Error.

March 15, 1911.

BRADLEY *v.* CITY OF RICHMOND.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 38. Submitted November 6, 1912.—Decided February 24, 1913.

A privilege tax may perform the double function of regulating the business under the police power and of producing revenue if authorized by the law of the State.

Under the Fourteenth Amendment, neither the State nor its municipality can confer or exercise arbitrary power in classifying for purpose of regulating, licensing or taxing.

Whether the power of classifying be exercised by the State directly or by the municipality, it is the exercise of legislative discretion and subject to the guarantee of the Fourteenth Amendment.

The power of the State to determine what occupations shall be subject to license and tax is subject to no limitations save those of the due process and equal protection clauses of the Fourteenth Amendment, and nothing in the Fourteenth Amendment prohibits the State from delegating this power. *Gundling* v. *Chicago*, 177 U. S. 183.

An ordinance imposing a license on business, dividing it into several classes and giving the power of classification to a committee of the council with power of review by the entire council, is not an arbitrary exercise of power within the prohibitions of the Fourteenth Amendment, and so *held* as to the banker's license tax of Richmond, Virginia.

An ordinance imposing license taxes and authorizing classification which provides for a review will not be held unconstitutional because

the reviewing power might approve of an unjust classification—such an objection would apply to any tribunal.

The presumptions are that the tribunal charged with the duty of determining whether a classification is proper will not perform its duty unjustly.

If the right to be heard and obtain a review does not avail to protect rights under the Constitution, the right to judicial review remains under the general principles of jurisprudence. *Kentucky Railroad Tax Cases*, 115 U. S. 321.

The burden is on the one who complains of his classification under a legal ordinance to show that he was denied equal protection of the law by such classification.

Where errors of administration in classifying for taxation can be corrected on review, one complaining that he was denied equal protection of the laws must avail of the method provided before applying to the Federal courts for protection under the Fourteenth Amendment.

Where it is a clearly apparent error, this court will take notice of evident omission in the transcript of record of the word "not."

110 Virginia, 521, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of a license ordinance of the city of Richmond, Virginia, are stated in the opinion.

Mr. I. Henry Harris for plaintiff in error:

The ordinances and the tax imposed on the plaintiff in error were void as in violation of the due process and equal protection provisions of the Fourteenth Amendment. The power given to the Committee on Finance to tax and classify the persons or businesses mentioned, and the tax imposed by it was a naked and arbitrary power, neither restrained nor guided, and offends those provisions.

The guaranty of the Constitution prohibits laws which are capable of being exercised arbitrarily and with discrimination and unjustly and without regard to legal discretion. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gulf &c. R. R.* v. *Ellis*.

165 U. S. 150; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232–237; *Morton* v. *Macon*, 111 Georgia, 162. See also *Richmond* v. *Model Steam Laundry*, 111 Va. Rep. 758. The cases which hold that certain laws apply only to a certain class of the people or businesses are not applicable to the facts and the ordinance in question, because the ordinance in this case does not provide for any classification of persons or businesses mentioned therein, but delegates such classification to the Finance Committee. This distinguishes *Kentucky Railroad Tax Cases*, 115 U. S. 321; *McMillan* v. *Anderson*, 95 U. S. 37; *Clark* v. *Titusville*, 184 U. S. 329; *Gundling* v. *Chicago*, 177 U. S. 183; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Engel* v. *O'Malley*, 209 U. S. 128.

There the statute fixed the terms and conditions and the fee on which the license should be issued and the comptroller who issued them had no arbitrary power. See also *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Brown-Forman Case*, 217 U. S. 563.

See *contra Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Boyd* v. *United States*, 116 U. S. 616, 635; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 561.

In urging that the tax is not unconstitutional, the defendant in error claims that the plaintiffs in error could have appealed to the council if any error was made. But such right to appeal is entirely irrelevant to the question here presented. What the committee could do under the ordinance the council could do. There is no difference whether the council or its committee fixed the class in which the plaintiffs in error were placed. The ordinance is impregnated with the vice already shown whether the council or its committee acted and the right to appeal could not save it from that vice.

Mr. H. R. Pollard for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

Appellant was convicted in the Hustings Court of Richmond for the violation of an ordinance forbidding the carrying on of the business of a "private banker" without a license. This judgment was affirmed by the Supreme Court of the State.

Numerous objections to the ordinance and to the tax, arising under the law and constitution of the State, were decided adversely to the plaintiff in error. With these we have no concern. The case comes here upon the claim made in the state court, and denied, that the ordinance denies both the equal protection of the law and due process as guaranteed by the Fourteenth Amendment.

The ordinance in question requires all persons desiring to pursue certain businesses and occupations to pay a special license tax for the privilege of prosecuting such business. Many pursuits are named, among them real estate agents, commission merchants, brokers, auctioneers, private bankers, etc. The persons required to pay such special license tax are to be divided by the finance committee of the city council into thirteen classes. The amount required to be paid by each class is as follows: First class, $800; second class, $600; third class, $400; fourth class, $300; fifth class, $250; and so on in decreasing amounts to the thirteenth class which is required to pay only $10. This classification by the finance committee is to be made with the advice and assistance of "the commissioner of revenue, the city tax collector, or any city officer."

The tax imposed is not merely an exercise of the police power regulating a business, but is a tax assessed as a condition upon which the license issues. Though it fulfills the double function of both regulating the business and producing revenue, it was fully authorized by the law of the State as adjudged by the very judgment under review:

Gundling v. *Chicago*, 177 U. S. 183, 189. Since the purpose of the statute is double, it is plain that to exact the same amount from each person or firm subject to the tax might result in inequality of burden under like circumstances and conditions. Therefore it was that the ordinance provided for a division into classes, those in each class paying the same tax.

The objection to the ordinance does not grow out of any contention that there may not exist just and reasonable distinctions justifying a greater tax upon some of these persons or firms engaged in doing what is called a "private banking" business than upon others engaged in the same general business; but arises from the fact that the law provides no rule by which some are to be placed in one class and some in another. An ordinance which commits to a board, committee or single official the power to make an *arbitrary* classification for purposes of taxation, would meet neither the requirement of due process, nor that of the equal protection of the law.

But this ordinance does not authorize any arbitrary classification, nor could the State or the council legally confer or exercise arbitrary power in classifying for the purpose of either regulating or licensing or taxing. The guarantee of the Fourteenth Amendment would forbid.

But whether the power of classifying be exercised by the State directly or by a city council authorized to require the payment of such a tax as a condition to the issuance of a license, it is at last the exercise of legislative discretion and is subject, in either case, to the guarantee referred to.

But when the matter concerns the determination of the business or occupation which may be required to take out a license and pay a tax as a condition of obtaining such a license, the power of the State is subject to no limitations, save those found in the guarantee of due process and the equal protection of the law. In the present instance, the State has delegated this power of selecting the businesses

and occupations carried on within the city of Richmond and of dividing them into classes and determining the amount of the tax to be paid by the members of each class. The state Supreme Court has decided that there can be no objection under the constitution of the State to such delegation. Neither do we see any reason under the Fourteenth Amendment why the State may not delegate to either the council of the city or to a board appointed for that purpose the power to divide such occupations or privileges into classes or sub-classes, and prescribe the tax to be paid by the members of each such class. *Gundling* v. *Chicago*, 177 U. S. 183; *Fischer* v. *St. Louis*, 194 U. S. 361, 372; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 560. In the case last cited, this court said:

"That this court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safety of its people there can be no doubt."

That this ordinance does not contemplate any arbitrary discrimination between the persons or firms subject to the license tax is evident from the direction that they shall be divided into thirteen classes, the members of each class to pay the particular amount named as a condition to the issuance of a license. It is also evident from the provisions in respect of notice, right to be heard and a right to a review by the council itself. These are obvious guards against unjust and capricious inequalities.

The authority to classify is given to the finance committee of the city council. That was a committee of eleven members of a city council composed of forty members. The ordinance required this committee to make a tentative classification with the advice and assistance of certain city officials supposed to be acquainted with the general

subject. When made the classification is required to be filed in the office of the city auditor for public inspection. The auditor is then required to give notice through two city newspapers that the tentative assessment is so filed in his office for examination and that all persons affected may be heard by the finance committee at times and places specified. From the final classification made by the committee the ordinance permits any aggrieved person to appeal to the full city council and there obtain a review.

But it is said that after all there is no security that the city council will not in the end approve of a scheme of classification operating most unjustly. The same objection might be made with reference to any tribunal required to determine such a matter. The presumptions which must be indulged run counter to the suggestion made.

If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States. This is the right which plaintiff in error has in this very case asserted. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335, 336.

There was obviously no want of due process of law in the imposition of the tax.

Finally, the plaintiff in error says that the actual operation of the ordinance has brought about an unjust and illegal discrimination in that he has been classified in such manner as to subject him and his business to a higher tax, as a condition of issuing to him a license, than that required of many other private bankers. This was a defense made in the state court. But that court, after saying that it was competent for the council to assign private bankers to different classes, and that the plaintiff in error

had been required to pay no greater license tax than all others in the same class, said:

"In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. *Norfolk &c.* v. *Norfolk*, 105 Virginia, 139. That has not been shown in the present case; on the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax."

That some private bankers were put into classes which subjected them to less taxation than the class into which the plaintiff in error was placed is the only allegation which would tend to show discrimination. But there was evidence tending to show that the business done by the plaintiff in error and ten other persons or firms was that of lending money at high rates upon salaries and household furniture, while the kind of business done by others in the same general business was the lending of money upon commercial securities. Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification. The state court said that he had failed to show that these private bankers favored in the classification were doing the same business.

In *Home Telephone Company* v. *Los Angeles*, 211 U. S. 265, 280, 281, the complaint was that the city, under an authority to regulate the charges for telephone service, had given a more favorable rate to a rival company and had thereby illegally discriminated. After saying that the allegation of such difference was "too vague to pass upon," this court said:

"Whether the two companies operated in the same territory, or afforded equal facilities for communication, or rendered the same services does not appear. For aught that appears, the other company may have brought its

patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation."

See also *Sweet* v. *Rechel*, 159 U. S. 380, 392.

But it is not necessary to rest our judgment upon the question as to whether the plaintiff in error was rightly or erroneously classified, because we are of opinion that he is not in a situation to complain. There was obviously no want of due process of law in the scheme of the ordinance. The occupations to be subjected to the tax were defined. There was a maximum and minimum limitation as to the amount of the tax, dependent upon the classification. The classification was to be made after notice and a hearing and an appeal from the final action of the committee was permissible. The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under the circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council. *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Chicago, B. & Q. Rd.* v. *Babcock*, 204 U. S. 585, 598.

It is true that in the opinion of the Hustings Court it is inadvertently said that of the opportunities afforded by the act for curing any wrong he had "availed himself." It is likely that the word "not" has been accidentally omitted. This we say because the brief of the defendant in error says that he did not appeal to the city council and in the brief of the plaintiff in error this is admitted. In addition, we add that there is no evidence that he in any way appeared or pointed out any injustice done him.

Judgment affirmed.

MR. JUSTICE LAMAR concurs in the result.